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*Alfred Cowles*

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THE  
FIRST PART  
OF THE  
INSTITUTES  
OF THE  
LAWS OF ENGLAND.

---

IN THREE VOLUMES.

---

VOL. I.



THE  
**FIRST PART**  
OF THE  
**Institutes of the Laws of England;**  
OR, A  
**COMMENTARY UPON LITTLETON :**

NOT THE NAME OF THE AUTHOR ONLY, BUT OF THE LAW ITSELF.

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*Quid te vana juvant misere ludibria chartæ ?  
Hoc lege, quod possis dicere jure meum est.*

MART.

*Major hereditas venit unicuique nostrum à jure et legibus, quàm à parentibus.* CICERO.

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Hæc ego grandævus posui tibi, candide lector,

Authore **EDWARDO COKE**, MILITE.



THE FIRST AMERICAN, FROM THE SIXTEENTH EUROPEAN EDITION ;

REVISED AND CORRECTED, with Additions of NOTES, REFERENCES,  
and PROPER TABLES.

By **FRANCIS HARGRAVE AND CHARLES BUTLER**,

ESQUIRES, OF LINCOLN'S-INN.

INCLUDING ALSO THE NOTES OF

Lord Chief Justice **HALE** and Lord Chancellor **NOTTINGHAM :**

AND

An ANALYSIS of LITTLETON, written by an unknown Hand in 1658-9.

TO WHICH ARE NOW ADDED, CONSIDERABLE IMPROVEMENTS,

By **THOMAS DAY, Esq.**

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**PHILADELPHIA :**

PUBLISHED BY JOHNSON AND WARNER, AND  
SAMUEL R. FISHER, Jr.

.....  
1812.





## ADVERTISEMENT

### TO THE FIRST AMERICAN EDITION.

THE improvements attempted in this edition relate to the general index, and the annotations of former editors. In revising the index, the text of *Littleton* and the commentary of *Coke*, were examined sentence by sentence throughout the work, and compared with the index. The errors and deficiencies were thus discovered ; the former were immediately corrected, and the latter supplied. The plan was also varied in some degree, and the form modernized. To the annotations of *Hargrave* and *Butler*, additions have been made, in which some notice has been taken of the principal decisions which have since appeared in *England* and in the *United States*, upon the same or analagous points. A list of the cases cited by the present editor is prefixed to the third volume, and a separate index to the principal matters in his own notes is appended.



**TO THE RIGHT HONOURABLE**

**EDWARD, LORD THURLOW.**

**BARON THURLOW OF ASHFIELD,**

**IN THE COUNTY OF SUFFOLK,**

**LORD HIGH CHANCELLOR OF GREAT BRITAIN,**

**THIS WORK**

**IS,**

**WITH HIS LORDSHIP'S PERMISSION,**

**RESPECTFULLY DEDICATED.**



THE  
EDITOR'S  
ADDRESS TO THE PUBLIC.

THE very high and advanced price, at which the *two'st* edition of Sir Edward Coke's *First Institute*, or *Commentary upon Littleton*, has been sold for a long time past, is a proof, that a *new* edition is now wanted in order to supply the public demand. This of itself may be thought a sufficient reason for offering a *new* edition; but another, and more cogent motive concurs in inducing to such a proposal; for, notwithstanding the advantages, which may have been given to the *tenth*, *eleventh*, and *two'st* editions, there still remains an ample field for further improvements. It is not intended, by this observation, in the least to derogate from the merit of those three editions; of which the *tenth* and *eleventh* are particularly thought by some to deserve commendation, as well on account of the care and industry exerted in correcting the errors of former impressions, as on account of the knowledge and judgment shewn in the additional notes and references. But a work like Sir Edward Coke's *Commentary*, so crowded with references to other books and authorities, will ever leave room for corrections; and being written on a subject so dependent, as the law necessarily is, on the opinions of the time *present*, and so frequently undergoing changes by acts of the legislature, will continually call for additions. These considerations may suffice to evince the propriety of attempting a *new* edition; but something further is requisite to recommend *that* now offered to the public; and therefore the editor will explain the plan on which he proposes to conduct it.

*Littleton's Tenures* and Sir Edward Coke's *Commentary* will be printed from the *second* edition, that being generally esteemed the most correct one of the *Commentary*; but it will be occasionally compared with the *first* and *other* editions, *all* of which have been procured for that purpose. Also the text of Littleton will be collated with the *Rohan* edition, which was that preferred by Sir Edward Coke, and a still *earlier* one by *Lettau* and *Mechlinia*, which was printed in the life time of Littleton, or within a year after his death, and has *never yet* been made use of in any edition of the *Commentary*. For the use of these two most curious and scarce editions of Littleton, the editor is indebted to the kindness of one, whose name he should think it an honour to be at liberty to

to mention. The editor is also provided with the curious editions of Littleton by *Punson* and *Redman*, which are the next in date to the *Rohan* edition. He is possessed too of an edition in 1534 by Rastell, and of *most* of the *other* editions of Littleton, which are very numerous; but these latter, not being of so great authority, will seldom be consulted. It is proper to add, that the editor proposes to give the various readings of *four* or *five* of the earliest editions of Littleton, which has never been attempted before. But no various readings will be given, except where they appear to the editor *substantially* to affect the sense of the author\*; and therefore the reader will not find *any* in the *first* section; the difference of the several editions, so far as regards that section, being apparently quite *immaterial*. As to *references*, those in the *first*, *second*, and *other* editions of Sir Edward Coke's Commentary before the *tenth*, having been made by Sir Edward Coke himself, will be *wholly* retained, with such corrections only of apparent mistakes as shall occur to the editor. Many of the additional references in the *tenth*, *eleventh*, and *twelfth* editions will also be retained; it being intended only to omit such as the editor shall discover to be plainly foreign to the purpose. The editor is aware, that even some of Sir Edward Coke's own references have been complained of as not pertinent; which, when the prodigious number of them, and the great variety of public and private affairs which commanded his attention through life, are considered, may be accounted for, without any great reflection on his care and accuracy. But the editor would deem it a presumption in him to *omit any* part of the *original* work; though, in respect to the references, such a liberty is in very numerous instances taken in the *twelfth* edition†; and besides, he would by no means be understood to engage for an examination of *every* reference with the book cited, which is a task far greater than his

\* This may seem not quite consistent with *sometimes* giving the word *Nota* as a various reading; but the reason of it is, that Littleton is thought by Sir Edward Coke to use the word *Nota* in a sense peculiarly significant. See Co. Litt. 22. a.—The various readings of Littleton, taken from the edition by *Letton* and *Mechlinia*, will be distinguished by *L.* and *M.* those from the *Rohan* edition by *Roh.* those from *Punson's* edition by *P.* and those from *Redman's* edition by *Red.* and if a reading should be taken from any *other* edition, it will be particularly mentioned. In *Redman's* edition there are references to cases in some of the more ancient Year Books, which it was once intended to have given as part of the various readings from *Redman*; but, on re-consideration, they do not appear of sufficient consequence to be taken notice of.

† The editor has not yet found such a liberty taken in any edition, except the *twelfth*; but in *that* the omission of Lord Coke's references is very frequent indeed, and he doubts whether many pages can be found without instances of it. In several pages he finds *twenty* or *thirty* references omitted, and in some *forty* or *fifty*. The truth of this will appear by examining fol. 4. b. and 5. a. of the *twelfth* edition with the same folios in any preceding one. The editor would not be so *early* in making this observation, if it was not with a view to shew how unaccountable it is, that notwithstanding this *suppression* of a great part of the authorities, on which Lord Coke founds his opinions, the *twelfth* edition should sell for *six pounds*, whilst the price of some of the more early editions, though they contain the *whole* of the original work, and therefore are infinitely more valuable, is scarce as many *shillings*.

his other avocations will allow him to engage in \*. Further, it is proposed by the editor, to give some additional references, particularly to the Reports published since the *twelfth* edition; and some notes; but he avoids promising a *great* number of either, lest he should undertake more than he may hereafter be able to accomplish. However, in order to make amends for the smallness of the number of new notes and references †, great care shall be taken in the choice of them; and they shall be so expressed, as clearly to shew whether they tend to confirm, to question, to contradict, or to illustrate, the doctrine advanced in the text; a distinction very requisite for the convenience and information of the reader, though in new editions of law-books too frequently neglected. In the *eleventh* and *twelfth* editions, the *new* references are not distinguished from Sir Edward Coke's: but in this present edition it is thought proper to acquaint the reader, which belong to him, and which to his respective editors; and for that purpose, the additional references, taken from the *enth*, *eleventh*, and *twelfth* editions, will be enclosed between *parentheses*; and those, with the notes by the editor of this edition, with the various readings of Littleton, will be referred to by figures, and placed at the bottom of the page. Such a discrimination is a justice due to those from whom the references proceed, particularly to Sir Edward Coke; and, at the same time, must be a satisfaction to the reader.—The *eleventh* and *twelfth* editions contain some notes and additions, shewing the alterations in the laws since the time of Sir Edward Coke, which were printed separately at the end of the work. This has been found inconvenient; and therefore, in the present edition, they will be placed in the margin of the book where they respectively apply; except such of them as the editor shall find improper to be retained, or such as shall consist of extracts from acts of parliament, which, being too long for marginal insertion, will be omitted; and it is hoped, that the omission of those extracts will not be disapproved of, as a short reference to the statutes themselves, with an intimation that they have altered the law, will be substituted, which will equally answer the purpose of apprizing the reader‡.—In all the former editions, the French text

\* It is necessary to mention this, lest the *continuation* of those mistaken references by lord Coke, which are to be found in all the former editions, should be imputed to the inattention of the editor of the present edition, and as a negligence not consistent with his engagements to the public. The editor may add, that many of the mistakes are of such a kind, that to correct them, and to refer to the books or authorities intended, would exceed his utmost diligence and power.

† At first the editor doubted, whether it would be in his power to give the time necessary for writing *many* notes and references; but this first number of the work, he hopes, will convince his readers, how anxious he is to furnish a great number; and he will exert himself to the utmost in order to continue the work on the same enlarged plan. Having engaged in the undertaking, he is resolved at all events to make great sacrifices, rather than suffer it to languish in his hands.

‡ The notes added in the 11th and 12th editions, exclusive of extracts from acts of parliaments, are so *few*, that all put together scarce amount to so much as the additional matter given by the editor of the present edition in his first number; and he is now doubtful, whether he shall retain any of them in their original form. However, if he should, they shall be distinguished in the manner above mentioned.

## THE EDITOR'S ADDRESS

text of Littleton's *Tenures*, and the whole of Sir Edward Coke's *Commentary*, were printed in the *black* letter; but in this edition only *Roman* and *Italic* letters will be used\* which, it is presumed, will be both an agreeable and useful alteration in the printing; the *black* letter being generally deemed less pleasing, and more fatiguing to the sight, than either of the others.—In respect to the *Index* to the First Institute, it is at present intended, that it shall be the same as in the *eleventh* and *twelfth* editions; the editor thinking that having already undertaken so much, it would be imprudent to pledge himself still further, by entering into any engagement for making additions to the *Index*.

To the *ninth* and *subsequent* editions were added Sir Edward Coke's *Readings* on the *Statute of Fines*, and on *Bail* and *Mainprize*; to the *tenth*, *eleventh*, and *twelfth*, was added his *Copyholder*; and to the two latter the *Treatise* of the *Old Tenures* was also added. All these tracts will be given in the present edition; but with this difference, that the *Reading* on the *Statute of Fines* will be in *English*, and the *Treatise* of *Old Tenures*, instead of being in French only, will be accompanied with the *Old English* translation, as printed at the end of the *first* edition of the *Terms of the Law*. The *original French* of the *Old Tenures* is continued, on account of the great antiquity of the book; but in the printing, the *black* letter will not be used\*.

Besides Sir Edward Coke's *Tracts* and the *Old Tenures*, the present edition will have an *Analysis* of *Littleton*, from a manuscript, dated 1658-9, which has never yet been printed. This *Analysis* is a methodical summary of *Littleton*, containing not only a *general* view of the *whole* work, but also a *particular* one of *each* chapter. It accidentally fell into the hands of the editor. He is not informed who was the author; but it appears to him to be judiciously and ingeniously executed, and worthy of publication; and he hopes that it will not be deemed an improper addition, more especially as it will neither occasion the suppression of any other matter, or increase the price of the work to the purchasers.

To the whole will be prefixed a new *Preface*, by the editor of the present edition. In this *preface*, he proposes, in the *first* place, to consider the merit of *Littleton's Tenures* and *Sir Edward Coke's Commentary*, and to point out the excellencies of each; in the *next* place, to give a *particular* account of the several editions of both; and, *lastly*, to explain how this will differ from the former editions.

Such is the edition of Sir Edward Coke's First Institute, now submitted as a candidate for the public favour and encouragement; nor shall any exertion within the power of the editor be wanting to deserve them. He foresees that *great pains* and

\* [Towards the conclusion of this work it was found advisable wholly to omit the republication of these tracts, being already printed in a separate octavo volume.]



*labour* will be necessary to the effecting a due performance of his engagements, and that *little fame* can be expected from the most successful execution of an undertaking, so humble as scarce to exceed that of a *mere* editor. But still he looks forward with pleasure. His veneration for the names of Littleton and Coke; his admiration of their writings; his persuasion that an attentive contemplation of them, by the improvement it must produce, will be its own reward; and his zeal to be instrumental in exhibiting them to the public eye, pure, genuine, and undisguised, and with as many advantages as a faithful and industrious editor can bestow: these were the considerations, which *chiefly* prompted him to commence the undertaking; and these, he trusts, will continue to animate him till it is completed. If, by perseverance and an unremitting ardour, the editor should succeed in his endeavours, he will then have the pleasing satisfaction of reflecting, that his labours have been useful, instructive, and agreeable to himself, and, at the same time, not wholly unprofitable or unacceptable to the community\*.

FRA. HARGRAVE.

\* From some late circumstances there is reason to apprehend, that the editor's situation in respect to the work he has undertaken is greatly misunderstood. The *insire* conduct of the edition is intrusted to him; but he is not the *proprietor* of it; nor is he personally interested in the *loss or profits*, which may attend the publication. His engagements to the *proprietors* of the edition are of a very *limited* kind. Those he has entered into with the *public* are very *extensive*. For the *former* engagements, a benefit, which was offered without any application on his part, is secured to him, independently of the event of the publication; but he can truly say, that it was the *least* of the considerations, which induced him to undertake the work, and that he would still cheerfully renounce it, if by so doing he could render the work more valuable to the *public*. For his *latter* engagements he desires no other reward, than the approbation of those for whose benefit his labours are intended.—The editor finds, that several respectable persons have expressed surprize at publishing the work by *Numbers*. This mode of publication, though, in itself, not liable to any great exception, has, by the *abuse* of it, become rather disreputable in the *appearance*; and therefore when it was first proposed to the *editor* by the *proprietors* of the Edition, he objected to it. But on considering the great and immediate expences incident to their undertaking, and the other reasons urged by them, they were found too cogent to be resisted; and the editor was the more easily induced to acquiesce, because he found the proprietor smost ready to put themselves to every expence which he recommended, for the purpose of rendering the work more acceptable to the public.



## ADDRESS

FROM

*Mr. HARGRAVE,*ANNOUNCING HIS RELINQUISHMENT OF  
THIS WORK, &c.

**M**R. HARGRAVE, the editor of so much of the **NEW EDITION OF COKE UPON LITTLETON** as has been published, at length finds his relinquishment of the undertaking in an unfinished state quite unavoidable. Numerous and severe are the sacrifices, which he has heretofore made, in order to accomplish the original proposals in their fullest extent. To this moment he feels the effect of those sacrifices; nor is he likely ever to conquer wholly the disadvantage already incurred from them. But it might be improper and disgusting to enter into particulars upon this head, which in its nature is too personal to the editor to be interesting to others. He will therefore be content with generally declaring, that his situation is become such, as to render him unequal to any longer sustaining the weight of those labours, which he has ever found incident to the work upon the extended plan of annotation adopted by him from the commencement of the edition, though certainly not belonging to it from the very limited professions and terms originally held out to the Public. It is from personal considerations, and in his own defence, that he thus adverts to having passed the bounds of the first undertaking in the actual execution: because, as he feels himself open to censure, from those indisposed to yield to indulgent construction, for having done **LESS** than he promised, he too plainly sees the necessity of striving to soften such censure by the recollection of his having also done **MORE**. In truth, had he not rashly exceeded the limits first prescribed, by wandering into the wide field of annotation, it is most probable, that the **WHOLE** of the edition would have been finished long ago, and consequently that the editor would not now have to mortify himself by apologizing for executing only **ONE HALF OF IT\***. This to be sure is the most favourable point of view for the editor; its tendency being to shew, that his excess of zeal to render the edition **VALUABLE** has been one cause of his finally leaving it **IMPERFECT**. If it shall be thought proper by

\* The **COKE** upon **LITTLETON**, exclusive of the Preface and Index, consists of 393 folios, or 786 pages. Mr. HARGRAVE has proceeded in the new edition, and actually published to the end of folio 190 or page 380, which is exactly 13 folios short of one half of the work.

others

others kindly to receive the editor's apology in this form, it will qualify his unhappiness at the painful and trying moment of separation from a very favourite work before its advancement into maturity. Should a less indulgent construction be applied to the editor, it will deeply wound feelings already enough exercised; but from a consciousness of being open to some degree of exception for what rigid observers may style an undefeasible abandonment of a work so long promised to be compleated, he must in that case kiss the rod, and submit himself to the severity of animadversion with a patient humility.

It is no small consolation to Mr. Hargrave to accompany this recital of his failure in the edition, with information of its having fallen into the hands of a professional gentleman† of such a description, as to warrant expecting from him a quick and able execution of the remainder of the undertaking. As Mr. Hargrave understands, his successor is prompted to engage in the work by an extreme partiality for it, and from having been in the habit of studying and annotating on the COKE UPON LITTLETON. He also possesses the important advantage of having long practised in the conveyancing line; to which, as Mr. Hargrave can speak from his own experience as a barrister in that branch of the law, a familiarity with the law of real property, and consequently with the writings of LITTLETON and COKE, is peculiarly essential. These and other considerations claim from Mr. Hargrave much beyond a hope, that the depending edition of COKE UPON LITTLETON will gain considerably by change of the editor; and that the new adventurer in this arduous undertaking will stamp the remainder of the edition with much greater value than could be reached by any efforts however vigorous from the original editor.

FRA. HARGRAVE.

*Boswell-Court, 18 Jan. 1785.*

† CHARLES BUTLER, of Lincoln's-Inn, Esquire.

# PREFACE

## TO THE THIRTEENTH EDITION.

THE reputation of LITTLETON'S TREATISE on TENURES is too well established, to require any mention of the praises which the most respectable writers of our country have bestowed on it. No work on our laws has been more warmly or generally applauded by them. But some foreign writers have spoken of it in very different terms. At the head of these is Hottoman, who, in his Treatise "*De Verbis feudadalibus*," thus expresses himself: "*Stephanus Pasquierius excellenti vir ingenio, et inter Parisienses causidicos dicendi facultate præstans, libellum mihi Anglicanum Littletonium dedit, quod Feudorum Anglicorum Jura exponuntur ita inconditè, absurdè, et inconcinnè scriptum, ut facilè appareat, verissimum esse, quod Polydorus Virgilius, in Anglicâ Historiâ, de Jure Anglicano testatus est, stultitiam in eo libro, cum malitiâ, et calumniandi studio, certare.*" This passage from Hottoman is cited without any disapprobation in the sixth edition of Struvius's *Bibliotheca Juris Selecta*; but in the 8th edition of that work (Jenz 1736) it is qualified by the words "*singularia sed parum apta sunt, quæ Franciscus Hottomanus profert, &c.*" Gatzert, in his "*Commentatio Juris exotici Historico-Literaria de Jure communi Angliæ*," (Gottingen 1765) gives the following account of Littleton and his works: "*Æqualis huic, tempore, ast doctrinâ famâ et meritis longe superior fuit, immortalitatem nominis apud posteros, si quis unquam merito consecutus, Thomas Littleton; a quo juris studium inchoant hodie Angli, plane ut suum olim, ab edicto Prætoris et XII Tabulis, Romani. Hic igitur ICtus, absolutis disciplinis academicis, jura patria mox cum plausu in Interiori Templo Londinensi, quæ paulo ante ibidem didicerat, aliquantum temporis professus, ab Henrico VI. ad officium primo judicandi in curia Palatii vocatus est. Advocati deinde ac procuratoris regii (king's serjeant) muneri a° 1455 admotus, judexque porro ambulatorius factus provincialis, (justice of assizes) et tandem inter judicantes communium placitorum curiæ a° 1466 ab Edoardo IV. relatus, dignus habitus est, qui multum ampliori, quam solebat, stipendio ordinisque adeo Balnei honoribus a° 1475 donaretur. Vivere desiit a° 1533\*.—Unicum librum scripsit, sed qui plurimum loco est, si spectas eruditionem et argumentum. In eo excussit doctrinam juris patrii difficillimam, gravissimam, usuque quotidianò maxime commendabilem; qualia nempe, et quotuplicia sint feuda Angliæ, quænam eorum jura, obligationes, præstationes atque servitia. In usus quidem Richardi filii, et aliorum quorundam ad explicanda illis capita aliquot opusculi DE TENURIS*"

General observations on Littleton's Tenures.

\* This is a strange mistake, as Littleton died in 1482.

" ab incerto auctore Edoardi III, ævo conscripti. Gallice primo  
 " fuit compositus, mox Gallice deinde sæpius et Anglice, mox vero  
 " Gallice et Latine, typis excusus. Viginti quinque servitorum  
 " feudaliū genera statuit, quæ tribus libris, in quos omne opus  
 " disperitur, persecutus est. Titulum hunc esse voluit OF TEN-  
 " URES. In anno editionis originariæ a Cokio qui a<sup>o</sup> 1533 ponit  
 " dissentiunt, eamque circa ..<sup>o</sup> 1477 non diu post inventam typo-  
 " graphiæ artem prodiisse, valde vero similiter statuunt Biographi  
 " Brit. vol. V. qui cum Nicholsono, p. 233. late etiam de argumento  
 " imprimis, et divisione libri agunt. Editio duodecima 1738 lu-  
 " cem vidit. Cokius in præfatione sui ad Littletonum Commenta-  
 " rii, de quo mox disseram, inter plura quæ auctorem concernunt  
 " ejusque opus XV. ICtos nominis magni alios appellat, qui eodem  
 " tempore floruerunt. Exhibit præterea imaginem Littletonianam.  
 " Cæterum liber ob methodi brevitatem, argumentandi subtilitatem,  
 " atque dictorum ordinem, laudem omnino meretur; sed nec minus  
 " fatendum est, adeo sæpissime obscuritati bonum hominem studu-  
 " isse, ut ænigmata legum maluisse, quam præcepta, tradere vid-  
 " eatur. Multa jam immutata esse, plura inveterata atque obsoleta,  
 " non urgeo. Interim communis ICtorum Anglorum hæc vox est  
 " perfectissimum et absolutissimum hoc opus esse ex omnibus quæ  
 " unquam in ulla scientia humana scripta sint quæ unquam proferre  
 " potuerit hominis ingenium; non intelligere qui culpent. Ita parum  
 " abest, quin credant, falli eum fuisse nescium!"

The English reader will probably be surprised at these accounts  
 of Littleton. Hottoman has the reputation of great learning, and  
 elegant writing; but he has been blamed very generally for the con-  
 temptuous language with which he speaks even of the writers of his  
 own civil law.

Gravina, while he mentions his endowments, both natural and  
 acquired, with admiration, censures his abuse of other judicial writ-  
 ters with great severity. Speaking of him, he says, " Non modo in  
 " Accursianis et Bartolinis interpretibus reprehendendis, sed in ipso  
 " Triboniano perpetuo exagitando, collectam totâ vita opinionem  
 " verecundiæ atque modestiæ, prorsus amisit." Grav. lib. 1. §. 179.

Cujas also was supposed to allude to him in a passage of his  
 works, where having occasion to mention the writers who find fault  
 with the disposition and arrangement of the civil law, he says,  
 " Quam illi sunt imperitissimi! nam neque quid ars sit sciunt;  
 " neque artem digestorum aut principia certa juris ulla perceperunt  
 " unquam; suaves tamen ad ridendi materiam."

But Hottoman's general disposition to abuse, is not the only cir-  
 cumstance by which his virulent censure of Littleton may be account-  
 ed for. Full of the doctrines of the feudal laws of his own country,  
 he might expect to find doctrines of a similar nature in Littleton,  
 without adverting that the greatest part of Littleton's work treats of  
 the subordinate and practical part of the laws of England, which,  
 like that of every other country, is in a great degree peculiar to  
 itself, and bears but a remote analogy to those of other countries.  
 It is allowed, that the feudal polity of the different countries of  
 Europe is derived from the same origin; that there is a marked  
 similitude in their principal institutions; and a singular uniformity

in the history of their rise, perfection, decline, and fall. But the more we go from a view of their general constitutions and governments to a view of their particular laws and customs, the less this similitude and uniformity are discoverable.

Thus the history of every country where the feudal laws have prevailed, while it presents us, on the one hand, with an account of the many restraints imposed by them upon alienation, and of the many methods which have been taken to make property unalienable, presents us, on the other, with an account of the different arts which have been used to elude those restraints, and to make property free. This is as observable in the law of England, as it is in the law of any other country.

But the mode by which it has been effected in England, is peculiar to England. In other countries where a liberty of alienation has been introduced, it has rested on a kind of compromise with the lord, by paying him a certain fine ; and a kind of compromise with the relations of the feudatory, by allowing them a right of redemption, commonly called the "*jus retractus*." But the steps by which a free alienation of property has obtained ground in England are very different. In England an unlimited freedom of aliening socage and military land was soon allowed ; the practice of sub-infeudation was soon abolished ; the alienation of lands was restrained by the introduction of conditional fees, and afterwards by the introduction of estates tail ; entails from their first establishment were greatly discountenanced by the courts of justice, and they were eluded by the doctrines of discontinuance and warranty. In the course of time, a fine was made a bar to the claims of the issue in tail, and a common recovery to the claims both of the issue and of those in remainder and reversion. Most of these circumstances are peculiar to the History of England. Hence an English reader, who opens the writings of the foreign feudists with an expectation of finding there something applicable to the practical parts of the law of his own country, respecting the alienation of landed property, will be greatly disappointed. He will find the most positive prohibition of aliening the fee without the consent of the lord : he will find very nice and subtle disquisitions of what amounts to an alienation : he will find that, in some countries, the lord's consent still continues a favour ; that in others it is a right, which the tenant may claim on rendering a certain fine. In short, he will find the works of foreign feudists filled with accounts of the "*jus retractus*," or "*droit de rachat*," the "*retraite lignager*," and the "*droit des lods et des ventes* ;" but he will hardly find the words, or any thing equivalent to the words, conditional fee, estate tail, discontinuance, warranty, fine, or recovery, in the sense in which we use them.

The same may be observed on the doctrine of conditions. According to the strict principles of the feudal law, no conditions could be annexed to a fief, except the implied conditions to which every fief was subject, from the obligation of service on the part of the tenant, and the obligation of protection on the part of the lord. Every fief to which any express or conventional condition was annexed, was, from that very circumstance, ranked among improper fiefs. But fiefs in England were at all times susceptible of every kind of condition.

It would be easy to pursue these observations through the subsequent chapters of Littleton's Treatise. If even we consider the subject on a more extensive scale, we shall find some circumstances peculiar to the English law, which must necessarily occasion a very essential and marked difference between the constitution and forms of the government of England and the constitution and forms of the government of other countries. Such are the universal conversion of allodial lands into fiefs; the total abolition of sub-infeudation; the freedom of alienation of estates in fee-simple; and the limited and dependant situation of our nobility, when contrasted with the situation of the high nobility of foreign countries: all these are peculiar in a great measure to our laws. It follows, that our writers must be silent on many of the topics which fill the immense volumes of foreign feudists; and they, from the same circumstance, must be equally silent on many of the subjects which are discussed by our writers. That this is so, will appear to every person conversant with the ancient writers on our laws, who will give a cursory look at the writers on the feudal laws of other countries. Nothing in this respect can be more different than those parts of the writings of Bracton, Britton, Fleta, Littleton, sir Edward Coke, and sir William Blackstone, which treat of landed property, and the books of the fiefs, Cujas's Commentary upon them, the various treatises on feudal matters collected in the 10th and 11th volumes of the "*Tractatus Tractatum* \*," Du Moulins's *Commentarii* in "*priores tres Titulos Consuetudinis Parisiensis* †," or the more modern treatises of Monsieur Germain Antoine Gytte ‡, and Monsieur Hervé §.

\* The title of this work is, "*Oceanus Juris, sive Tractatus Tractatum Juris universi, duce et auspice Gregorio 13. in unum congesti, a Fr. Ziletti.*" There are two editions of this work, both printed at Venice; the first in 1548, the second in 1584. The first edition is in 16 tomes, generally bound in 12 volumes; the second is in 18 tomes, generally bound in 29 volumes. The arrangement of this work is greatly admired; but it is not a work in great request, even in those countries which are governed by the civil law.

† This is usually the first treatise printed in the general collection of his works. An abridgement of it was published in 1773 by Mr. Henrion de Pensey, under the title of "*Traité des Fiefs de Du Moulin, Analysé et Conferé avec les autres Feudistes.*"

‡ The title of this work is, "*Traité des Matieres Feodales, tant pour le Pays Contumier que pour celuy du Droit escrit, avec des observations.* Par Germaine Antoine Guyot. Paris, 1738. and Ann. Suiv. 7 vol. in 4to."

§ "*Theorie des Matieres Feodales et Censuelles, ou l'on developpe la Chaine de ces Matieres, dans un Ordre et sous un Aspect, qui en facilitent l'intelligence, y repandent de nouvelles Lumieres, et mettent a des Definitions neuves des Contrats de Fiefs, & de Cens.* Par Monsieur Hervé 1785. Paris, 6 vol. in 8vo." The first volume of this work contains an historical account of the rise, progress, and present state of fiefs in France. In 1756, Monsieur Bouquet published one volume of a work entitled, "*Le Droit Public de la France.*" In his preface to it he promised to continue and complete it in two more volumes, but he is since dead, without having published any part of the continuation; a circumstance greatly to be regretted by the lovers of this

These



These observations are offered with a view to account for the contemptuous manner in which the two foreign writers cited above, speak of Littleton. They may also account in some measure, for a circumstance which has been a matter of some surprize, the total silence of sir Edward Coke on the general doctrine of fiefs. It is obvious, how extremely desirous his lordship is upon every occasion to give the reasons of the doctrines laid down by him; and what forced, and sometimes even puerile reasons he assigns for them; yet though so much of our law is supposed to depend upon feudal principles, he never once mentions the feudal law.

"I do marvel many times, says sir Henry Spelman, that my lord Coke, adorning our law with so many flowers of antiquity and foreign learning, hath not (as I suppose) turned aside into this field, i. e. feudal learning, from whence so many roots of our law have, of old, been taken and transplanted. I wish some worthy would read them diligently, and shew the several heads from whence those of ours are taken. They beyond the seas are not only diligent, but very curious in this kind: but we are all for profit and 'lucrando pane,' taking what we find at market, without enquiring whence it came." But this complaint is open to observation.

There is no doubt but our laws respecting landed property are susceptible of great illustration from a recurrence to the general history and principles of the feudal law. This is evident from the writings of lord chief baron Gilbert, particularly his treatise of Tenures, in which he has very successfully explained, by feudal principles, several of the leading points of the doctrines laid down in the works of Littleton and sir Edward Coke, and shewn the real grounds of several of their distinctions, which otherwise appear to be merely arbitrary. By this he reduced them to a degree of system, of which till then they did not appear susceptible. His treatise, therefore, cannot be too much recommended to every person who wishes to make himself a complete master of the extensive and various learning contained in the works of those writers. The same may be said of the writings of sir William Blackstone. Much useful information may be derived also from other writers on these subjects.

But the reader, whose aim is to qualify himself for the practice of his profession, cannot be advised to extend his researches upon those subjects very far. The points of feudal learning, which serve to explain or illustrate the jurisprudence of England, are few in number, and may be found in the authors we have mentioned.

It is not impossible but further enquiries might lead to other interesting discoveries. But the knowledge absolutely necessary for eve-

kind of learning, as the first volume is executed in a most masterly manner. The English reader will perhaps find it the most interesting and instructive work that has yet appeared on the subject in the French language. If the reader wishes to pursue his researches on the subject, he will find some assistance from a small work printed at Frankfort in 1799, entitled, "*Joannes Adami Koppii Historia Juris Scientiæ Romanæ Feodalis Privatæ ac Publicæ. 1 vol. 8vo.*"

ry person to possess who is to practise the law with credit to himself and advantage to his clients, is of so very abstruse a nature, and comprehends such a variety of different matters, that the utmost time which the compass of a life allows for the study, is not more than sufficient for the acquisition of that branch of knowledge only; still less will it allow him to enter upon the immense field of foreign feudality. It were greatly to be wished that some gentleman, possessed of sufficient time, talents, and assiduity, would dedicate them to this study. Those who have read the late doctor GILBERT STEWART'S "View of Society in Europe, in its Progress from "Rudeness to Refinement," will lament that he did not pursue his researches. From such a writer, a work on this subject might be expected, at once entertaining, interesting, and instructive; but such a work is not to be expected from a practising lawyer. Whatever may be the energies of his mind, his industry, his application and activity, he will soon feel, that to gain an accurate and extensive knowledge of the law, as it is practised in our courts of justice, requires them all. Thus, on the one hand, the student will find an advantage in some degree of research into feudal learning; on the other, he will feel it necessary to bound his researches, and to leave, before he has made any great progress in them, the Book of Fiefs, and its commentators, for Littleton's Tenures and sir Edward Coke's Commentary\*.

If it were proper to enter into a further defence of Littleton, it might be done by observing, that it must be a matter of great doubt, whether Hottoman ever saw, or Gatzert more than saw, the work they so severely censure. Hottoman, if he had read it, *might* think it inelegant and absurd; but he *could not* think it malicious, or indicative of a disposition to slander. Gatzert says Littleton specifies twenty-five kinds of feudal services. It is probable, that by services he meant tenures; if he did, it is obvious that he confounded those chapters of Littleton which treat of the nature of the feudal estate, with those chapters which treat of the nature of the feudal tenure: in every other sense the word Services, applied in this manner to Littleton's work, is without a meaning.—Besides, he mentions Latin editions of Littleton, when no edition in that language ever appeared.

In fact, were it not for the general observations to which they naturally give rise, neither the criticism of Hottoman nor that of Gatzert would have been noticed.

When doctor Cowell, in his Law Dictionary, cited the passage in question from Hottoman, it raised universal indignation, and he expunged it from the later editions of his book. It certainly was unjust to impute it as a crime to doctor Cowell, that he inserted this citation in his work; but the manner in which it was received is a striking proof of the high estimation in which Littleton's Treatise was held.

\* In the fifteenth edition an attempt is made to continue Mr. Hargrave's enchoate note on the Feudal Tenures, and to render it as useful as the nature of the subject admits to the practitioner and the student.

The reputation of SIR EDWARD COKE'S COMMENTARY is not inferior to that of the work which is the subject of it. It is objected to it, that it is defective in method. But it should be observed, that a want of method was, in some respects, inseparable from the nature of the undertaking. During a long life of intense and unremitting application to the study of the laws of England, sir Edward Coke had treasured up an immensity of the most valuable common-law learning. This he wished to present to the public, and chose that mode of doing it, in which, without being obliged to dwell on those doctrines of the law which other authors might explain equally well, he might produce that profound and recondite learning which he felt himself to possess above all others. In adopting this plan, he appears to have judged rationally, and consequently ought not to be censured for a circumstance inseparable from it.

General observations on sir Edward Coke's Commentary.

It must be allowed that the style of sir Edward Coke is strongly tinged with the quaintness of the times in which he wrote; but it is accurate, expressive, and clear. That it is sometimes difficult to comprehend his meaning, is owing, generally speaking, to the abstruseness of his subject, not to the obscurity of his language.—It has also been objected to him, that the authorities he cites do not in many places come up to the doctrines they are brought to support. There appears to be some ground for this observation. Yet it should not be forgot, that the uncommon depth of his learning, and acuteness of his mind, might enable him to discover connections and consequences which escape a common observer.

It is sometimes said, that the perusal of his Commentary is now become useless, as many of the doctrines of law which his writings explain are become obsolete; and that every thing useful in him may be found more systematically and agreeably arranged in modern writers. It must be acknowledged, that when he treats of those parts of the law which have been altered since his time, his Commentary partakes, in a certain degree, of the obsolescence of the subjects to which it is applied; but even where this is the case, it generally happens that the doctrines laid down by him serve to illustrate other parts of the law which are still in force. Thus,—there is no doubt but the cases which now come before the courts of equity, and the principles upon which they are determined, are extremely different in their nature from those which are the subject of sir Edward Coke's researches. Yet the great personages who have presided in those courts, have frequently resorted to the doctrines laid down by sir Edward Coke, to form, explain, and illustrate their decrees. Hence, though portions charged upon real estates, for the benefit of younger children, were not known in Littleton's time, and not much known in the time of sir Edward Coke; yet on the points which arise respecting the vesting and payment of portions, no writings in the law are more frequently or more successfully applied to than sir Edward Coke's Commentary on Littleton's Chapter of Conditions. It may also be observed, that notwithstanding the general tenor of the present business of our Courts, cases must frequently occur which depend upon the most abstruse and intricate parts of the ancient law. Thus the case of *Jacob v. Wheate* led to the discussion of escheats and uses as they stood before the statute of Henry VIII. and the case of *Taylor v. Horde* turned on the learning of disseisins.

But

But the most advantageous and, perhaps, the most proper point of view in which the merit and ability of sir Edward Coke's writings can be placed, is by considering him as the centre of modern and ancient law.—The modern system of the law may be supposed to have taken its rise at the end of the reign of king Henry VII. and to have assumed something of a regular form about the latter end of the reign of king Charles II. The principal features of this alteration are, the introduction of recoveries; conveyances to uses; the testamentary disposition by wills; the abolition of military tenures; the statute of frauds and perjuries; the establishment of a regular system of equitable jurisdiction; the discontinuance of real actions; and the mode of trying titles to landed property by ejectment. There is no doubt, but, during the above period, a material alteration was effected in the jurisprudence of this country: but this alteration has been effected, not so much by superseding, as by giving a new direction to the principles of the old law, and applying them to new subjects. Hence a knowledge of ancient legal learning is absolutely necessary to a modern lawyer. Now sir Edward Coke's Commentary upon Littleton is an immense repository of every thing that is most interesting or useful in the legal learning of ancient times. Were it not for his writings, we should still have to search for it in the voluminous and chaotic compilation of cases contained in the Year-books; or in the dry, though valuable Abridgments of Statham, Fitzherbert, Brooke, and Rolle. Every person, who has attempted, must be sensible how very difficult and disgusting it is, to pursue a regular investigation of any point of law through those works. The writings of sir Edward Coke have considerably abridged, if not entirely taken away, the necessity of this labour.

But his writings are not only a repository of ancient learning; they also contain the outlines of the principal doctrines of modern law and equity. On the one hand, he delineates and explains the ancient system of law, as it stood at the accession of the Tudor line; on the other, he points out the leading circumstances of the innovations which then began to take place. He shews the different restraints which our ancestors imposed on the alienation of landed property, the methods by which they were eluded, and the various modifications which property received after the free alienation of it was allowed. He shews, how the notorious and public transfer of property by livery of seisin was superseded, by the secret and refined mode of transferring it, introduced in consequence of the statute of uses. We may trace in his works the beginning of the disuse of real actions; the tendency in the nation to convert the military into socage tenures, and the outlines of almost every other point of modern jurisprudence. Thus his writings stand between, and connect the ancient and modern parts of the law, and by shewing their mutual relation and dependency, discover the many ways by which they resolve into, explain, and illustrate one another.

Account of the editions of Littleton without the Commentary.

It has not yet been settled, and perhaps cannot now be settled, with any degree of precision, when the first EDITION of LITTLETON's work was printed. Sir Edward Coke's mistakes respecting the Rohan edition, are pointed out in the note taken from the 12th edition to that part of his Preface. Decut<sup>h</sup> Middle-  
ton,

ton, in his Account of Printing in England, conjectures the edition by J. Lettou and W. Machlinia, to have been printed in 1481, and that it is the first edition. This makes the printing of the book to have been within six or seven years after Caxton's introduction of the art into England, and within twenty-four years after the first invention of it. Dr. Middleton's conjecture is supported by the concurrent circumstance of the time when those printers appear to have been in partnership; and no other edition bears evidence of a prior title to antiquity. Another edition of nearly equal pretensions to precedence with the Lettou and Machlinia edition, has lately appeared from the library of the late William Bayntun, esq. It has remained hitherto undescribed, and was probably unknown to all who have undertaken to notice the several editions of this work. At the end it is said to be printed by Machlinia alone, then living near Fleet-bridge: from which, and other circumstances, it is clearly distinguishable from the former edition. The letter used in printing it is less rude, and more like the modern English black letter, than the letter used in the joint edition of Lettou and Machlinia, and the abbreviations are much less numerous. These circumstances afford some, though but a faint ground to suppose it posterior in date to the former. Mr. Hargrave has both these editions. In 1766, Mons. Houard, an Avocat in the Parliament of Normandy, and Conseiller Echevin of the town of Dieppe, published at Rouen, in two volumes, the text of Littleton, with a French interpretation, notes, a glossary, and Pieces Justificatives. Many editions of Littleton in French and English only have been published in small octavo, twelves, sixteens, and twenty-fours. They are all of them very inaccurate. The French edition in 1585 is the first in which the sections are numbered. An edition in French and English, in double columns, with a table of the principal matters, was printed in duodecimo in 1671. Considering the universal estimation in which Littleton's work is held, and that it generally is the first work put into a student's hand, it is very singular, that since the editions by Lettou and Machlinia, and the Rohan edition, no correct edition of it without the Commentary has yet been published. The reader will hear with pleasure, that Mr. Hargrave has it in contemplation to favour the public with such an edition, and to print it in such a manner as will make it a typographical curiosity.

The first EDITION of SIR EDWARD COKE'S COMMENTARY upon Littleton was published in his life-time, in 1628: it is very incorrect. The second edition was printed in 1629, and is supposed to have been revised by the author. The subsequent editions, to the eighth inclusively, seem to have been printed from the second, without much variation. The ninth edition includes sir Edward Coke's Reading on Fines, and his Treatise on Bail and Mainprize. To the tenth edition are added, the Complete Copyholder, with many references. In the eleventh edition the book intitled the Olde Tenures is inserted. At the end, both of the edition of Littleton by Lettou and Machlinia and of that by Machlinia only, Littleton's work is called the "Tenores Novelli," to distinguish it (it is presumed) from the Treatise of "Olde Tenures." The eleventh edition has also several notes and additions, tending principally to shew the alteration of the law since the time of Little-

Editions of  
Littleton with  
sir Edward  
Coke's Com-  
mentary.

ton and his Commentator. The twelfth and last edition was published in 1738. Some observations upon it may be found in Mr. Hargrave's Address to the Public on his undertaking the present edition. An Abridgement of sir Edward Coke's Commentary was published in 1714, by Mr. Serjeant Hawkins; short but pointed observations are occasionally introduced in it, to explain the principles of the old law, and the alterations made in it by subsequent statutes.

Present edition.

Mr. Hargrave began the PRESENT EDITION, by publishing it in Numbers. Soon after his publication of the First Number, he was favoured with lord chief justice Hale's manuscript notes. By an advertisement prefixed to the Second Number, he informed the public that they were very numerous, as far as the Chapter of Knight Service; that there were few on the subsequent parts of the work; that for the communication of them, he was indebted to the liberal spirit of a noble lord\*, who, he observed, had ever distinguished himself as a zealous encourager of undertakings having the least tendency to promote science and learning; that in the original, some of the notes were in Latin, but most of them in Law-French; and that it was thought most convenient to give the latter in a literal English translation. Upon the publication of the Second Number, Mr. Hargrave received from sir William Jones an account of some few various readings from two English manuscripts of Littleton's Tenures. By an advertisement prefixed to the Third Number he informed the public, that both of these manuscripts were in the public library at Cambridge, being marked D d 11. 60. and M m 52; that the first was written on vellum, and was imperfect at the beginning, and in the Chapter of Warranty; and that the second, which seemed to be the most valuable, was written on paper, and had only one leaf torn, and that its antiquity appeared from the following note in the first page:

*Iste liber emptus fuit in cæmeterio Sti. Pauli  
London, 27th die Julii, anno regis E. 4ti. 20mo. 10s. 6d.*

that this date shewed that the manuscript was of Littleton's time, July, 20 E. 4. being in 1481, which was the year before Littleton's death; that in referring to the manuscripts, that in vellum would be distinguished by Vell. MS, and that in paper by Paper MS. With these assistances Mr. Hargrave completed that part of the edition which is executed by him. He then relinquished the work, and by an Advertisement, (which immediately precedes this Preface) he informed the public of it, and of the present editor's undertaking to continue the work.

Soon after the publication of this Advertisement, the present editor, through the obliging interference of John Holliday, esq. of Lincoln's-Inn, with the executors of the will of the late sir Thomas Parker, was favoured with a copy of the notes of lord chancellor Nottingham and lord Hale upon this work. The following account is given of them in a note in sir Thomas Parker's own handwriting:

"The notes to this book, in my hand-writing (except one note in  
"folio 26, b. and some modern cases), were transcribed from a copy of  
"the

\* The present Earl of Hardwicke.

“ the lord chancellor Nottingham’s manuscript notes, in the margin  
 “ of his lord Coke’s Commentary upon Littleton, which copy was  
 “ made for the use of his son Heneage Finch, esq. solicitor-general,  
 “ afterwards earl of Aylesford, and is now in the possession of the  
 “ honourable Mr. Legge, to whose favour I am indebted for  
 “ these notes.

“ The notes in a different hand-writing were transcribed from a  
 “ copy of lord chief justice Hale’s MSS. notes in the margin of  
 “ Coke upon Littleton, presented by lord Hale to the father of  
 “ Philip Gybbon, esq. which copy was made for the use of the hon-  
 “ ourable Charles Yorke, esq. his Majesty’s solicitor-general. The  
 “ book in which the notes are in the hand-writing of lord Hale, is  
 “ now in the possession of Mr. Gybbon ; and the book from which  
 “ these notes were transcribed by the favour of Mr. Yorke, is now  
 “ in his possession.

“ T. PARKER, 1758.”

Under these circumstances the THIRTEENTH EDITION has been completed in its present form.

When it became generally known that Mr. Hargrave had relinquished the work, the present editor engaged in it ; but he did not engage in it while there was the slightest probability of its being undertaken by any other person : and even then, he would not have engaged in it, if by doing so he incurred any obligation of completing Mr. Hargrave’s undertaking in *all* its parts. He thought, an *imperfect execution* of the remaining part of the work would be more agreeable to the public than *none* ; that to present them with the remaining part of the text of Littleton and his Commentator, with *some* references, and *some* notes, would be an acceptable offering to them. No other person appeared with any, and the present Editor’s performance does not prevent the exertions of any future adventurer.

LINCOLN’S-INN,  
 Nov. 4, 1787.

CHARLES BUTLER.





DEO,  
PATRIÆ,

TIBI,

*Proœmium.*

OUR author, a gentleman of an ancient and a fair-descended family de Littleton, took his name of a town so called, as that famous chief-justice sir John de Markham, and divers of our profession, and others, have done.

The name and degree of our author.

Thomas de Littleton, lord of Frankley, had issue Elizabeth his only child, and did bear the arms of his ancestors, viz. argent a chevron between three escalop-shells sable. The bearing hereof is very ancient and honourable; for the senators of Rome did wear bracelets of escalop-shells about their arms, and the knights of the honourable order of St. Michael in France do wear a collar of gold in the form of escalop-shells at this day. Hereof much more might be said, but it belongs unto others.

His arms

Instituted by Lewis the Eleventh, king of France, 9 E. 4. 1469.

With this Elizabeth married Thomas Westcote esquire, the king's servant in court, a gentleman anciently descended, who bare argent, a bend between two cottises sable, a bordure engrayled gules, bezanty.

Thomas Westcote.

But she being fair, and of a noble spirit, and having large possessions and inheritance from her ancestors de Littleton, and from her mother, the daughter and heir of Richard de Quatermains, and other her ancestors (ready means in time to work her own desire), resolved to continue

tinue the honour of her name (as did the daughter and heir of Charleton, with one of the sons of Knightly, and divers others), and therefore prudently, whilst it was in her own power, provided by Westcote's assent before marriage, that her issue inheritable should be called by the name of de Littleton. These two had issue four sons, Thomas, Nicholas, Edmund, and Guy, and four daughters.

Our author here his mother's surname.

Thomas the eldest was our author, who bare his father's christian name Thomas, and his mother's surname de Littleton, and the arms de Littleton also; and so doth his posterity bear both name and arms to this day.

Camden.  
"The just shall  
"flourish like the  
"palmtree, and  
"spread abroad like  
"the cedar in  
"Libanus."  
Psalm. xcii. 11.

Camden, in his Britannia, saith thus: Thomas Littleton, alias Westcote, the famous lawyer, to whose Treatise of Tenures the students of the common law are no less beholden, than the civilians to Justinian's Institutes.

[\*] The best kind of quartering of arms.

The dignity of this fair descended family de Littleton hath grown up together and spread itself abroad by matches, with many other ancient and honourable families, to many worthy and fruitful branches, whose posterity flourish at this day, and quartereth many fair coats, and [\*] enjoyeth fruitful and opulent inheritances thereby.

King's serjeant,  
Rot. Pat. 33 H. 6.  
part. 1. m. 16.  
Mich. 34. H. 8.  
fol. 3. a. Judge of  
the Common Pleas,  
Rot. Pat. 6 E. 4.  
part. 1. m. 16.

He was of the Inner-Temple, and read learnedly upon the statute of *W. 2. De donis conditionalibus*, which we have. He was afterwards called *ad statum et gradum servientis ad legem*, and was steward of the court of Marshalsey of the king's household, and for his worthiness was made by king *H. 6.* his serjeant, and rode justice of assise the Northern Circuit, which places he held under king *E. 4.* until he, in the sixth year of his reign, constituted him one of the judges of the court of common pleas, and then rode Northamptonshire Circuit. The same king, in the 15th year of his reign, with the prince, and other nobles and gentlemen of ancient blood, honoured him with the knighthood of the Bath.

Knight of the Bath. 15. E. 4.

When he wrote this book.  
14 E. 4. tit. granty 5.

He compiled this book when he was judge, after the fourteenth year of the reign of king *E. 4.* but the certain time we cannot yet attain unto, but (as we conceive) it was not long before his death, because it wanted his last

last hand ; “ for that tenant by *elegit*, statute-merchant, “ and staple, were in the table of the first printed book, “ and yet he never wrote of them\*.”

Our author, in composing this work, had great furtherance in that he flourished in the time of many famous and expert sages of the law. [*a*] Sir Richard Newton, [*b*] sir John Prisot, [*c*] sir Robert Danby, [*d*] sir Thomas Brian, [*e*] sir Pierce Ardern, [*f*] sir Richard Choke, [*g*] Walter Moyle, [*h*] William Paston, [*i*] Robert Danvers, [*k*] William Ascough, and other justices of the court of common pleas : and of the king’s bench, [*l*] sir John June, [*m*] sir John Hody, [*n*] sir John Fortescue, [*o*] sir John Markham, [*p*] sir Thomas Billing, and other excellent men flourished in his time.

And of worldly blessings I account it not the least, that in the beginning of my study of the laws of this realme, the courts of justice, both of equity and of law, were furnished with men of excellent judgment, gravity, and wisdom. As in the chancery, sir Nicholas Bacon, and after him sir Thomas Bromley. In the exchequer-chamber, the lord Burghley, lord high treasurer of England, and sir Walter Mildmay, chancellor of the exchequer. In the king’s bench, sir Christopher Wray, and after him sir John Popham. In the common pleas, sir James Dyer, and after him sir Edmund Anderson. In the court of exchequer, sir Edward Saunders, after him sir John Jeffery, and after him sir Roger Manwood, men famous (amongst many others) in their several places, and flourished, and were all honoured and preferred by that thrice noble and vertuous queen Elizabeth of ever blessed memory. Of these reverend judges, and others their associates, I must ingenuously confess, that in her reign I learned many things, which in these Institutes I have published : and of this queen I may say, that as the rose is the queen of flowers, and smelleth more sweetly when it is plucked from the branch, so I may

Litt. 692. 739. & 740.

The deceased of his contemporaries.

[a] He died 27 H. 6.

[b] He died 39 H. 6.

[c] Died 11 E. 4.

[d] Died 16 H. 7.

[e] Died 7 E. 4.

[f] Overlived our author.

[g] Survived him also.

[h] Died 23 H. 6.

[i] Survived our author.

[k] Died 23 H. 6.

[l] Died 18 H. 6.

[m] Died 20 H. 6.

[n] Removed 1 E. 4.

[o] Removed 2 E. 4.

[p] Died 21 E. 4.

Queen Elizabeth.

\* That Littleton did intend to write of those tenancies, is plain from the 291st and 324th Sections ; but it may be justly questioned whether the fact alleged by my lord Coke, to support his opinion, be true ; because in the copy of the Bohan edition, now in Lincoln’s-Inn Library, and in that at this time in the booksellers custody, the Table mentions nothing concerning these tenancies ; nor does it seem probable that there ever was any other table, both the copies appearing on the nicest examination to be complete. Note to the 11th edition.—See also Note on Sect. 241. of the present edit.

say and justify, that she by just desert was the queen of queens, and of kings also, for religion, piety, magnanimity, and justice; who now by remembrance thereof, since Almighty God gathered her to himself, is of greater honour and renown than when she was living in this world. You cannot question what rose I mean; for take the red or the white, she was not only by royal descent and inherent birth-right but by roseal beauty also, heir to both.

And though we wish by our labours (which are but *cunabula legis*, the cradles of the law) delight and profit to all the students of the law in their beginning of their study (to whom the First Part of the Institutes is intended), yet principally to my loving friends, the students of the honourable and worthy societies of the Inner-Temple and Clifford's-Inn, and of Lion's-Inn also, where I was some time reader. And yet of them more particularly to such as have been of that famous university of Cambridge, *alma mea mater*. And to my much honoured and beloved allies and friends of the county of Norfolk, my dear and native country; and to Suffolk, where I passed my middle age; and of Buckinghamshire, where in my old age I live. In which counties, we, out of former collections, compiled these Institutes. But now return we again to our author.

Inner-Temple.  
Clifford's-Inn.  
Lion's-Inn.

His Marriage.

He married with Johan, one of the daughters and coheirs of William Burley, of Broomscroft-castle, in the county of Salop, a gentleman of ancient descent, and bare the arms of his family, argent, a fess checkie or and azure, upon a lion rampant sable, armed gules; and by her had three sons, sir William, Richard the lawyer, and Thomas.

His Issue.

The re-establishment of his posterity, by the matches of his three sons with virtue and good blood.

In his life-time, he, as a loving father and a wise man, provided matches for these three sons, in vertuous and ancient families, that is to say, for his son sir William, Ellen, daughter and coheir of Thomas Welsh esquire, who by her had issue Johan his only child, married to sir John Aston of Tixal, knight: and for the second wife of sir William, Mary the daughter of William Whittington esquire, whose posterity in Worceshire flourish to this day. For Richard Littleton his second son, to whom he gave good possessions of inheritance, Alice, daughter and heir of William Winsbury of Pilleton-Hall in the county

He gave possessions of inheritance to his younger sons for their better advancement.

county of Stafford esquire, whose posterity prosper in Staffordshire to this day. And for Thomas his third son, to whom he gave good possessions of inheritance, Anne, daughter and heir of John Bottreaux esquire, whose posterity in Shropshire continue prosperously to this day. Thus advanced he his posterity, and his posterity, by imitation of his vertues, have honoured him.

He made his last will and testament the 22d day of August, in the twenty-first year of the reign of king Edward the fourth, whereof he made his three sons, a parson, a vicar, and a servant of his, executors: and constituted supervisor thereof, his true and faithful friend, John Alcock, doctor of law, of the famous university of Cambridge, then bishop of Worcester; a man of singular piety, devotion, chastity, temperance, and holiness of life; who, amongst other of his pious and charitable works, founded Jesus College in Cambridge; a fit and fast friend to our honourable and vertuous judge.

His last will.

His executors, his supervisor.

He left this life in his great and good age, on the 23d day of the month of August, in the said twenty-first year of the reign of king Edward the fourth: for it is observed for a special blessing of Almighty God, that few or none of that profession die *intestatus et improles*, without will, and without child; which last will was proved the 8th of November following, in the Prerogative Court of Canterbury, for that he had *bona notabilia* in divers diocesses. But yet our author liveth still *in ore omnium jurisprudentium*.

His age.  
His departure.

Littleton is named in 1 *H.* 7. and 21 *H.* 7. Some do hold that it is no error either in the reporter or printer; but that it was Richard the son of our author, who in those days professed the law, and had read upon the statute of *W. 2. quia multi per malitiam*, and [\*] unto whom his father dedicated his book: and this Richard died at Pilleton-Hall in Staffordshire, in 9 *H.* 8.

1 *H.* 7. fol. 27.  
21. *H.* 7. fol. 32. b.W. 2. cap. 11.  
[\*] See Littleton,  
Sect. 749.

The body of our author is honourably interred in the cathedral church of Worcester, under a fair tomb of marble, with his statue or portraiture upon it, together with his own match, and the matches of some of his ancestors, and with a memorial of his principal titles; and out

His sepulchre.

out of the mouth of his statue proceedeth this prayer, *Fili Dei miserere mei*, which he himself caused to be made and finished in his life time, and remaineth to this day. His wife Johan, lady Littleton, survived him, and left a great inheritance of her father, and Ellen her mother, daughter and heir of John Grendon esquire, and other her ancestors, to sir William Littleton her son.

When this work  
was published.

F. N. B. 212. P

Note.

When this work  
was first imprinted.

This work was not published in print, either by our author himself, or Richard his son, or any other, until after the deceases both of our author and of Richard his son. For I find it not cited in any book or report, before sir Anthony Fitzherbert cited him in his *Natura Brevium*; who published that book of his *Natura Brevium* in 26 H. 8. Which work of our author, in respect of the excellency thereof, by all probability should have been cited in the reports of the reigns of E. 5. R. 3. H. 7. or H. 8. or by St. Jermyn in his book of the Doctor and Student \*, which he published in the three and twentieth year of H. 8. if in those days our author's book had been printed. And yet you shall observe, that time doth ever give greater authority to works and writings that are of great and profound learning, than at the first they had. The first impression that I find of our author's book was at Roan in France, by William de Tailier (for that it was written in French) *ad instantiam Richardi Pinson*, at the instance of Richard Pinson, the printer of king H. 8. before the said book of *Natura Brevium* was published; and therefore upon these and other things that we have seen, we are of opinion, that it was first printed about the four and twentieth year of the reign of king H. 8. since which time he had been commonly cited, and (as he deserves) more and more highly esteemed †.

He

\* This book appears to have been first published by J. Rastell, 1523. Ames.

† This opinion of my lord Coke's, concerning the time of the first impression of Littleton's Tenures, although it hath been followed by sir William Dugdale, in his *Origines Juridiciales*, and by bishop Nicholson, in his Historical Library, is certainly erroneous; for it appears by two copies now in the bookseller's custody, that they were printed twice at London in the year 1528, once by Richard Pinson, and again by Robert Redmayne; and that was the nineteenth year of the reign of H. 8. To determine certainly when the Rohan edition was published is almost impossible; and before any conjectures can be offered on that subject, 'twill be necessary to consider how conclusive the arguments his lordship draws from our author's not being cited as authority in the books he mentions may be; it either  
proves

He that is desirous to see his picture, may in the churches of Frankley and Hales-Owen see the grave and reverend countenance of our author, the outward man ; but he hath left this book, as a figure of that higher and nobler part, that is, of the excellent and rare endowments of his mind, especially in the profound knowledge of the fundamental laws of this realm. He that diligently reads this his excellent work, shall behold the child and figure of his mind, which the more often he beholds in the visual line, and well observes him, the more shall he justly admire the judgment of our author, and increase his own. This only is desired, that he had written of other parts of law, and especially of the rules of good pleading, (the heart-string of the common law) wherein he excelled ; for of him might the saying of our English poet be verified :

His picture.

The figure of his mind.

Thereto

proves what his lordship uses it for, or else that Littleton's authority was not then so well established as 'tis now (for which he gives us here a very good reason) : and that this last is true, the aforesaid editions do sufficiently evince, for their titles and conclusions run thus : " Littleton's Tenures, newly and " most truly corrected." And in the end, *Expliciunt Tenores Littletoni cum alterationibus eorundem et additionibus novis, nec non cum aliis non minus utilisioribus* : nay, these very additions are incorporated into the book itself, nor are they distinguished by any mark from the original. The weakness of this argument will further appear, if it should be applied to the discovering the time my lord Coke's Commentary on Littleton was first published, for this was not cited as authority for some time after its publication. The old editions above mentioned, Pynson's and Le Talleur's name, and the manner Littleton is printed in at Rohan, seem to be the only means of discovering what we seek. From those editions we may collect, not only that the Rohan impression is older than the year 1528, but also by what occurs in the beginning and end of them, that there had been other impressions of our author. From Pynson's name at the end of the Rohan edition, it may be concluded that he would not have engaged his friend William Le Talleur to have printed Littleton at Rohan, had he ever before printed any books in French ; and that he printed an Abridgment of the Statutes, part of which is in French, in the year 1499, appears by one of those books now in the same person's custody. Statham's Abridgment has his name to it, but there is no date, yet it being printed with the same types, and in the same manner, Littleton was at Rohan, and as it is a larger book, it is highly probable 'twas printed some time after the publication of Littleton's Tenures, and that Pynson's success in the lesser undertaking induced him to venture on the greater ; which in those days was the work of two or three years. William Le Talleur printed a Chronicle of the Dutchy of Normandy, as appears by his name and cypher at the end thereof, and the date in the beginning in the year 1437. The book itself is printed without any title-page, initial letter of the chapters, number of the leaves or year, and in a character much resembling writing, and with such abbreviations as are used in manuscripts : all which 'tis well known, to those who have seen many old books, are undoubted proofs of a book's being printed when that art was in its infancy. Upon the whole it may certainly be concluded, that the book was printed some years before 1437 ; because the above-mentioned Chronicle, which hath not so much marks of antiquity, was printed in that year ; and from what has been observed concerning the manner 'tis printed in, it will be thought by those who are versed in ancient books, to have been published ten years before that time. *Note to the 11th Edition.*

Thereto he could indite and maken a thing ;  
 Chaucer. There was no wight could pinch at his writing :

Good pleading.

so far from exception, as none could pinch at it. This skill of good pleading, he highly in this work commended to his son, and under his name to all other students sons of his law. He was learned also in that art, which is so necessary to a compleat lawyer ; I mean of logick, as you shall perceive by reading of these Institutes, where-  
 logick. in are observed his syllogisms, inductions, and other arguments ; and his definitions, descriptions, divisions, etymologies, derivations, significations, and the like. Certain it is, that when a great learned man (who is  
 Seneca. long in making) dieth, much learning dieth with him.

The commendation of his work.

That which we have formerly written, that this book is the ornament of the common law, and the most perfect and absolute work that ever was written in any humane science ; and in another place, that which I affirmed and took upon me to maintain against all opposites whatsoever, that it is a work of as absolute perfection in its kind, and as free from error, as any book that I have known to be written of any humane learning, shall to the diligent and observing reader of these Institutes be made manifest, and we by them (which is but a Commentary upon him) be deemed to have fully satisfied that, which we in former times have so confidently affirmed and assumed. His greatest commendation, because it is of greatest profit to us, is, that by this excellent work, which he had studiously learned of others, he faithfully taught all the professors of the law in succeeding ages. The victory is not great to overthrow his opposites, for there never was any learned man in the law, that understood our author, but concurred with me in his commendation : *Habet enim justum venerationem quicquid excellit* ; for whatsoever excelleth hath just honour due to it. Such as in words have endeavoured to offer him disgrace, never understood him, and therefore we leave them in their ignorance, and wish that by these our labours they may know the truth and be converted. But herein we will proceed no further, for *Stultum est absurdas opiniones accuratius refellere*. It is mere folly to confute absurd opinions with too much curiosity.

Cicero.

Aristotle.

And albeit our author in his Three Books cites not many authorities, yet he holdeth no opinion in any of  
 them,



them, but is proved and approved by these two faithful witnesses in matter of law, authority and reason. Certain it is, when he raiseth any question, and sheweth the reason on both sides, the latter opinion is his own, and is consonant to law. We have known many of his cases drawn in question, but never could find any judgment given against any of them, which we cannot affirm of any other book or edition of our law. In the reign of our late sovereign lord king James of famous and ever blessed memory, it came in question upon a demurrer in law, Whether the release to one trespasser should be available or no to his companion? Sir Henry Hobart, that honourable judge and great sage of the law, and those reverend and learned judges, Warburton, Winch, and Nichols, his companions, gave judgment according to the opinion of our author, and openly said, that they owed so great reverence to Littleton, as they would not have his case disputed or questioned: and the like you may find in this part of the Institutes. Thus much (though not so much as his due) have we spoken of him; both to set out his life, because he is our author, and for the imitation of him by others of our profession.

Nota.

Mich. 3. Jac. in  
communi banc. inter  
Cock & Ilmoun.

We have in these Institutes endeavoured to open the true sense of every of his particular cases, and the extent of every of the same, either in express words, or by implication; and where any of them are altered by any latter act of parliament, to observe the same, and wherein the alteration consisteth. Certain it is, that there is never a period, nor (for the most part) a word, nor an &c. but affordeth excellent matter of learning. But the module of a preface cannot express the observations that are made in this work, of the deep judgment and notable invention of our author. We have by comparison of the late and modern impressions with the original print, vindicated our author from two injuries: First, from divers corruptions in the late and modern prints, and restored our author to his own: Secondly, from all additions and encroachments upon him, that nothing might appear in his work but his own\*.

What is endeavoured by these  
Institutes.

\* In this Edition several material passages of the author are restored, by collating the text as published by Lord Coke with the more antient printed copies by Lettoun and Machlinia, Pynson, Redman, &c. as also with several antient MSS.

The benefit of  
these Institutes.

Our hope is, that the young student, who heretofore meeting at the first, and wrestling with as difficult terms and matter, as in many years after, was at the first discouraged as many have been, may, by reading these Institutes, have the difficulty and darkness both of the matter, and of the terms and words of art in the beginning of his study, facilitated and explained unto him, to the end he may proceed in his study chearfully and with delight; and therefore I have termed them Institutes, because my desire is, they should institute and instruct the studious, and guide him in a ready way to the knowledge of the national laws of England.

Wherefore called  
Institutes.

Wherefore pub-  
lished in English.

This part we have (and not without precedent) published in English, for that they are an introduction to the knowledge of the national law of the realm; a work necessary, and yet heretofore not undertaken by any, albeit in all other professions there are the like. We have left our author to speak his own language, and have translated him into English, to the end that any of the nobility or gentry of this realm, or of any other estate or profession whatsoever, that will be pleased to read him and these Institutes, may understand the language wherein they are written.

Regule.

30 E. 3. cap. 5.

I cannot conjecture that the general communicating of these laws in the English tongue can work any inconvenience, but introduce great profit, seeing that *Ignorantia juris non excusat*, Ignorance of the law excuseth not. And herein I am justified by the wisdom of a parliament; the words whereof be, "That the laws  
" and customs of this realm the rather should be reason-  
" ably perceived and known, and better understood by  
" the tongue used in this realm, and by so much every  
" man might the better govern himself without offending  
" of the law, and the better keep, save and defend his  
" heritage and possessions. And in divers regions and  
" countries, where the king, the nobles, and other of  
" the said realm have been, good governance and full  
" right is done to every man, because that the laws and  
" customs be learned and used in the tongue of the coun-  
" try:" as more at large by the said act, and the pur-  
view thereof may appear: *Et neminem oportet esse sapientiore legibus*, No man ought to be wiser than the law.

Regule.

And

And true it is, that our books of reports and statutes in ancient times were written in such French as in those times was commonly spoken and written by the French themselves. But this kind of French that our author hath used is most commonly written and read, and very rarely spoken, and therefore cannot be either pure, or well pronounced. Yet the change thereof (having been so long customed) should be without any profit, but not without great danger and difficulty: for so many ancient terms and words drawn from that legal French are grown to be *vocabula artis*, vocables of art, so apt and significant to express the true sense of the laws, and are so woven in the laws themselves, as it is in a manner impossible to change them, neither ought legal terms to be changed.

Our author's kind  
of French.

In school divinity, and amongst the glossographers and interpreters of the civil and canon laws, in logick, and in other liberal sciences, you shall meet with a whole army of words, which cannot defend themselves *in bello grammaticali*, in the grammatical war, and yet are more significant, compendious, and effectual to express the true sense of the matter, than if they were expressed in pure Latin.

36 E. 3. ub. sup.

This work we have called "The First part of the Institutes," for two causes: First, for that our author is the first book that our student taketh in hand: Secondly, for that there are some other Parts of Institutes not yet published, (viz.) The Second Part, being a Commentary upon the statute of *Magna Charta*, Westm. 1. and other old statutes. The Third Part treateth of criminal causes and pleas of the crown: which Three Parts we have, by the goodness of Almighty God, already finished. The Fourth Part we have purposed to be of the jurisdiction of courts: but hereof we have only collected some materials towards the raising of so great and honourable a building. We have, by the goodness and assistance of Almighty God, brought this twelfth work to an end: in the Eleven Books of our Reports we have related the opinions and judgments of others; but herein we have set down our own.

Wherefore called  
the First Part.

Before

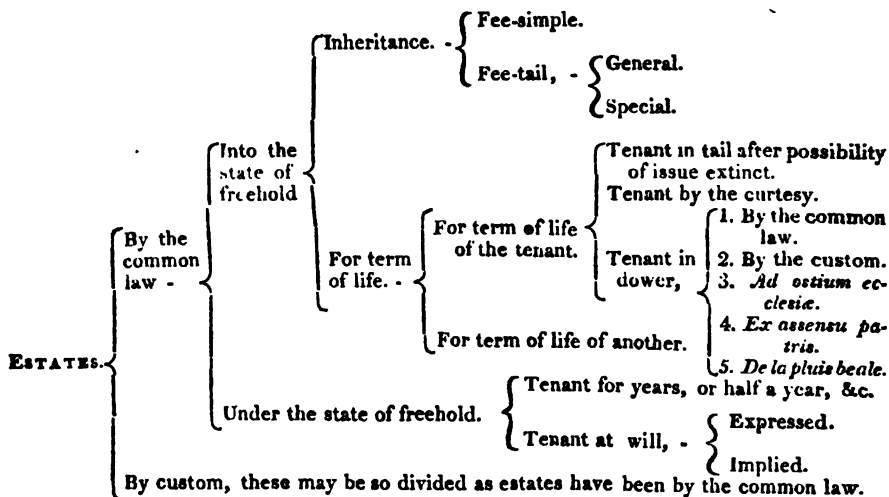
Lib. Sep. cap. ix.  
ven. 4. 10.

Before I entered into any of these Parts of our Institutes, I, acknowledging mine own weakness and want of judgement to undertake so great works, directed my humble suit and prayer to the Author of all goodness and wisdom, out of the Book of Wisdom; *Pater et Deus misericordiæ, da mihi sedium tuarum assistricem Sapientiam! Mitte eam de cælis sanctis tuis et à sede magnitudinis tuæ, ut tecum sit et tecum laboret, ut sciam quid acceptum sit apud te!* "Oh Father and God of mercy, give me wisdom, the assistant of thy seats! "Oh send her out of the holy heavens, and from the seat of thy greatness, that she may be present with me, "and labour with me, that I may know what is pleasing unto thee." *Amen.*

Bracton.

Our author hath divided his whole work into Three Books. In his First he hath divided estates in lands and tenements, in this manner: for *res per divisionem melius aperiuntur.*

#### A FIGURE of the DIVISION of POSSESSIONS.



Our author dealt only with the estates and terms abovesaid: somewhat we shall speak of estates by force of certain statutes, as of statute-merchant, statute-staple, and *elegit*, (whereof our author intended to have written)[\*] and likewise to executors to whom lands are devised for payment of debts, and the like.

I shall

[\*] See the first  
book to the  
Preface.

I shall desire that the learned reader will not conceive any opinion against any part of this painful and large volume, until he shall have advisedly read over the whole, and diligently searched out, and well considered of the several authorities, proofs and reasons, which we have cited and set down for warrant and confirmation of our opinions throughout this whole work.

*Regula.  
Incrédite est parte  
una perspecta, tota  
re non cognita, et  
non judicare.*

Mine advice to the student is, that before he read any part of our Commentaries upon any Section, that first he read again and again our author himself in that Section, and do his best endeavours, first of himself, and then by conference with others, (which is the life of study) to understand it, and then to read our Commentary thereupon, and no more at one time than he is able with a delight to bear away, and after to meditate thereon, which is the life of reading. But of this argument we have, for the better direction of our student in his study, spoken in our Epistle to our First Book of Reports.

And albeit the reader shall not at any one day (do what he can) reach to the meaning of our author, or of our Commentaries, yet let him no way discourage himself, but proceed; for on some other day, in some other place, that doubt will be cleared. Our labours herein are drawn out to this great volume, for that our author is twice repeated, once in French, and again in English.



## ANALYSIS OF LITTLETON.

**FEBRUARY 21, 1658-9.**

*Synopsis totius Littleton Analyticæ.*

LITTLETON'S TENURES May be divided into two parts, <i>scilicet</i> .	Titles of	Land of freehold	Estates of	Inheritance {	By the common law, as [Fee Simple, Book I. Chap. 1.		1.								
					By statute, as { Fee Taille . . . . . 2.		2.								
					By statute, as { Fee Taille after possibility of issue extinct . . . . . 3.		3.								
				Freehold by {	The act of law: tenant { By the Curtesy . . . . . 4.		4.								
					In Dower . . . . . 5.		5.								
					Agreement between party and party; as . . . . . 6.		6.								
				Reason of mixture with other possessions, <i>scilicet</i> by {	1 Descent, Parconary, Book III.		1.								
					2 Purchase, Jointenancy . . . . . 3.		3.								
					3 Both, Tenancy in Common . . . . . 4.		4.								
				Certain qualifications of estates by	other accidents tending to	Law itself.	Parties	Intituled by right,	strengthens the estate already established, as {	Remitter 12.	Warranty 13.				
		by adding a surer and better title thereto, as {	Release 8.									Confirmation 9.			
													Interested in the possession, as Attornment . . . . . 10.	10.	
		The destruction of estates by {	Discontinuance of a right . . . . . 11.			6.									
			Continuance of a wrong; the { manner how by descent . . . . . 6.				7.								
		means how to prevent it by continual claim . . . . . 7.				8.									
		Either, according to the performances or non-performances thereof, as Conditions . . . . . 8.					8.								
		Chattell, {	Reall. Personal. {			Certain, Tenant for years . . . . . 1. 7.		8, 9, 10.							
						Uncertain, Tenant at will . . . . . 8, 9, 10.									
		Tenures, <i>scilicet</i> the services which are as it were the bond betwixt the lord and tenant, whereby lands are held to . . . . .	Other lords also of these tenements, which are			The King only, as {	Grand Serjeanty . . . . . II. 8.	Petit Serjeanty . . . . . 9.	Spiritual, Frankalmoigne . . . . . 6.	Bodies {	Homage { not continued in the line continued in the line of the lord and tenant, called Homage Ancestral . . . . . 1.	Fealty . . . . . 7.	2.		
				Temporall, to be performed by their	Goods {									generally throughout the realm, {	
particularly in private places, Burgage . . . . . 10.															
Both these tenants bring {	Fees {			Escuage . . . . . 3.										Knights Service . . . . . 4.	
				Bond Villenage . . . . . 10.											





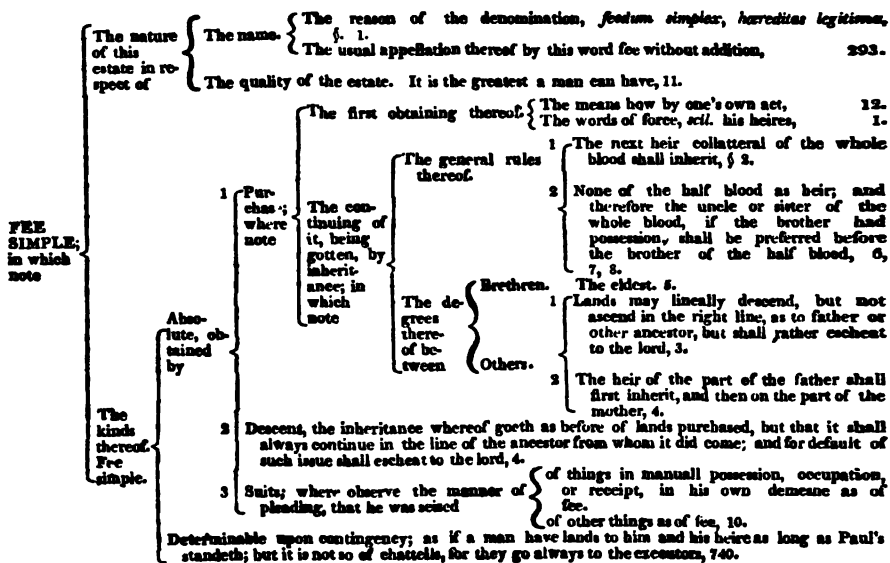
## ANALYSIS OF LITTLETON.

**FEBRUARY 21, 1658-9.**

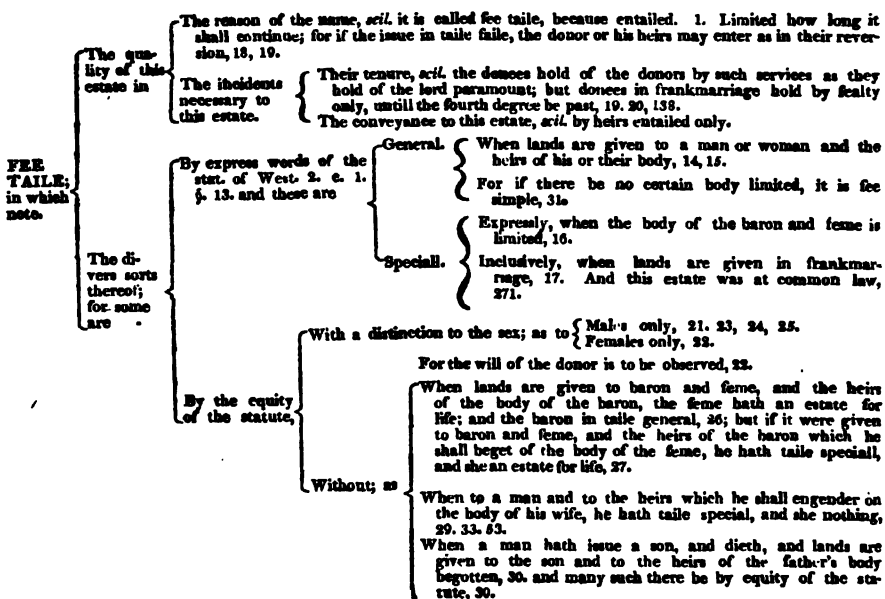
*Synopsis totius Littleton Analyticæ.*

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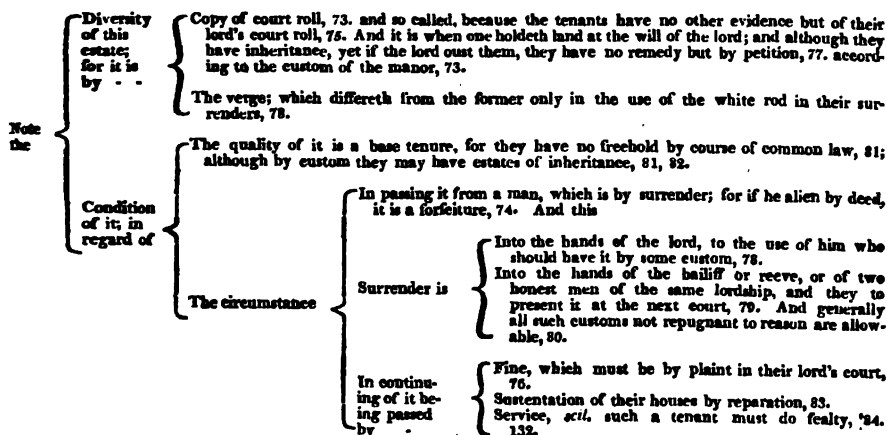
## Fee Simple. Lib. 1. Cap. 1.



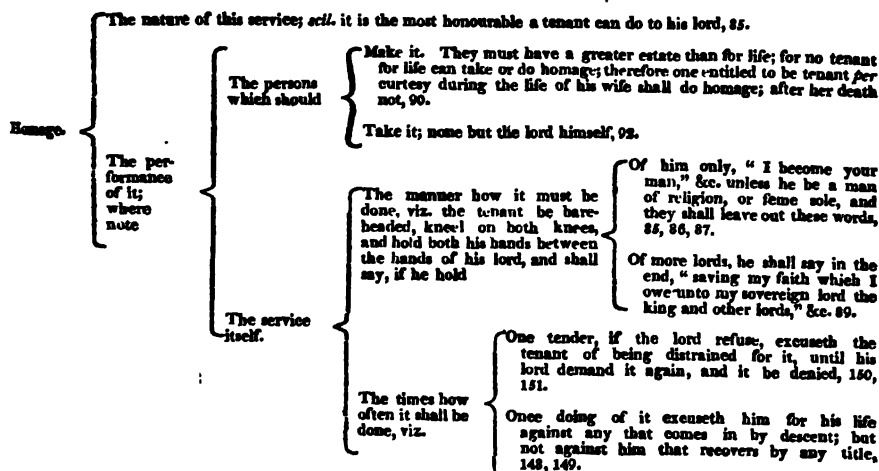
## Fee Tail. Lib. 1. Cap. 2.



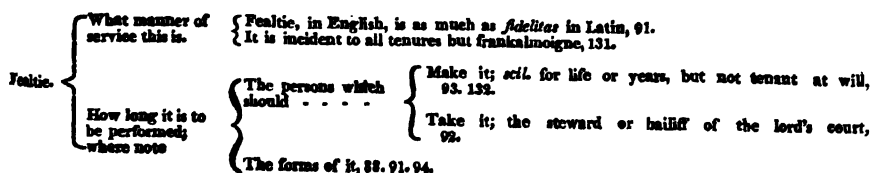
## Tenant at Will according to Custom. Lib. 1. Cap. 9, 10.



## Homage. Lib. 2. Cap. 1.



## Fealties. Lib. 2. Cap. 2.



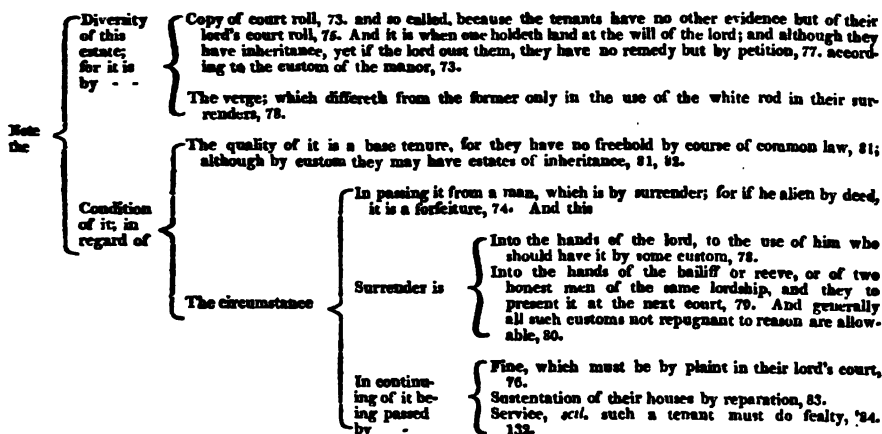
## Tenant for Years. Lib. 1. Cap. 7.

Note the	Name of this estate, viz.																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																													
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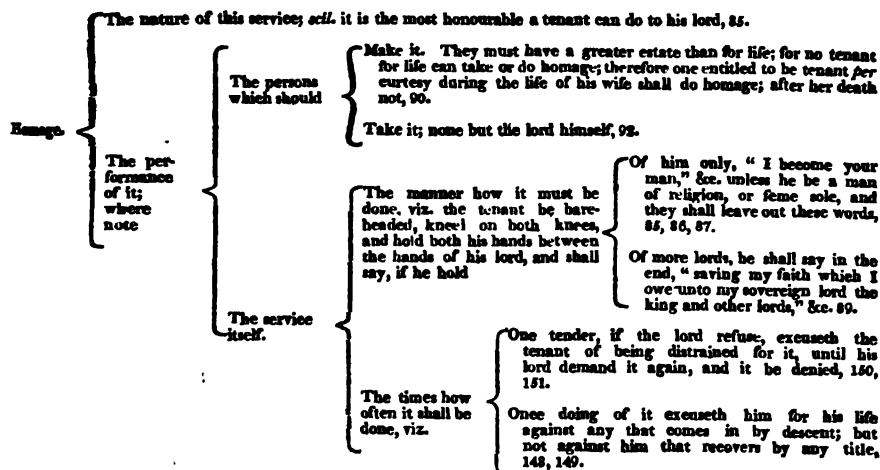
## Tenant at Will. Lib. 1. Cap. 8.

Note the	Divers sorts of this estate; for it is created either . . . . .		{ Expressly; as when one letteth lands to hold at his will; and it is called so, because there is no certainty of the estate but only at will, 68. If therefore it be granted to the lessee and his heirs at will, this word (heirs) is void, 82. Yet if the lessor determine his will, the lessee shall have convenient time to carry away his corn and household stuff, as well as executors for the goods of their testator, 68, 69. By implication; as when one having a deed of feoffment made unto him, and entereth before livery, 70.	
	Necessary appendances to this estate. For . . . . .		{ The services reserved. { They shall not do fealty, 84. They must pay the rent reserved, else may the lessor distrain or bring an action of debt, 73. The things he is not bound to reparations, yet is punishable for voluntary wast, as well as a bailee for goods lent him, 71.	

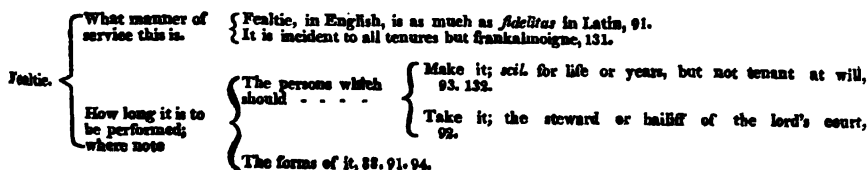
## Tenant at Will according to Custom. Lib. 1. Cap. 9, 10.



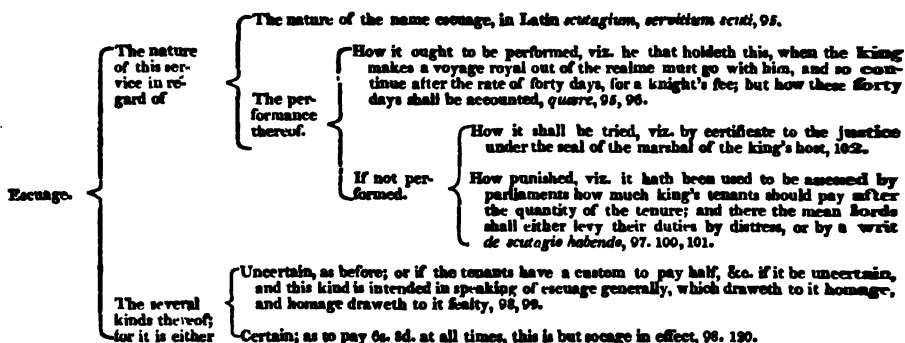
## Homage. Lib. 2. Cap. 1.



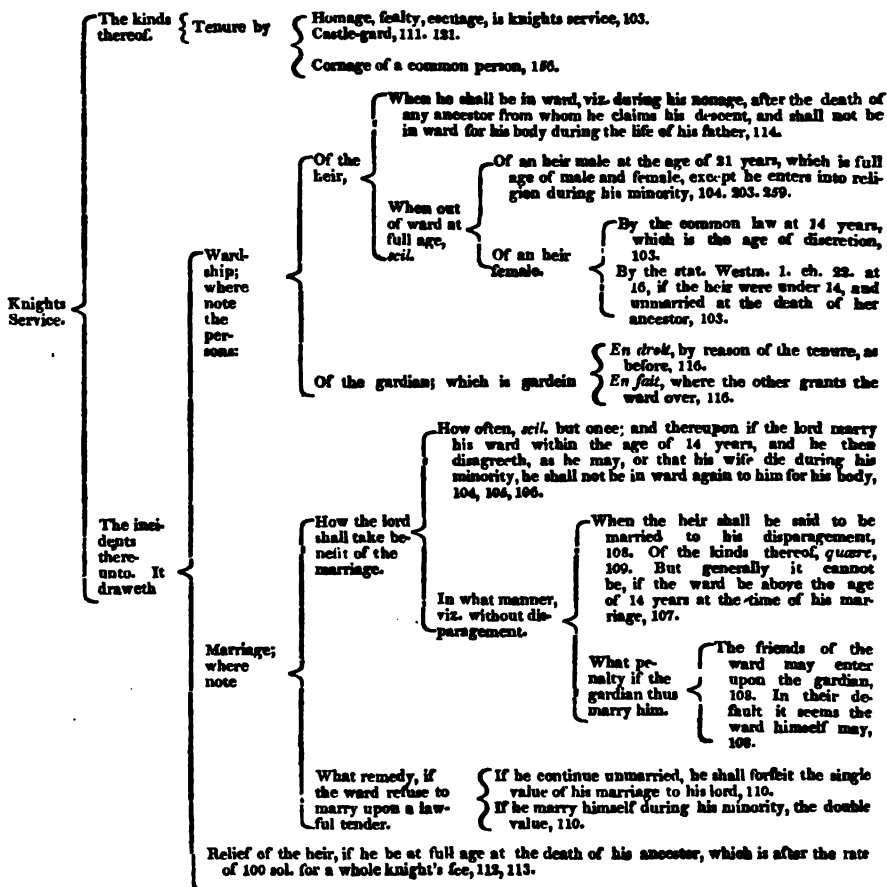
## Fealties. Lib. 2. Cap. 2.



## Escuage. Lib. 2. Cap. 3.



## Knights Service. Lib. 2. Cap. 4.



## Socage. Lib. 2. Cap. 5.

Socage.	The tenure itself; where note	The divers sorts thereof.	Where one holdeth lands by certain service for all manner of services, as homage and rent, or homage and fealty or homage, fealty, and rent, 117. By fealty only, if the lord refuse no other service, 118. 130, 131. By escuage certain, 130. to pay a sum certain for guarding a castle, 131. and generally, by any service which is not knight's service, 118.
			The denomination, <i>socagium</i> , or <i>servitiuum socas</i> ; the name whereof remaineth, although for the most part the manner of the service by mutual consent be altered into an annual rent, 119.
	The incidents appertaining	To the lord of whom the lands are holden, relief after the death of such a tenant: where note	How much must be paid for relief, <i>scil.</i> the value of a whole year's rent to the lord, 120. 128. When to be paid, <i>scil.</i> immediately, or else the lord may distrain for it, unless the services be of that quality that they cannot be gotten but at some certain time of the year, 127. 129.
		To the guardian in socage.	Ward: for if such tenant die, his heir within the age of 14 years, his <i>prochein amy</i> , to whom the inheritance cannot come, shall always have such heir in ward until he be 14 years of age; but he must account for the profit, the reasonable expenses deducted, and so must any other that taketh upon him as guardian; but account will not lie against executors but for the profits after the age of 14 years. <i>Quære</i> , whether it shall be brought against him for profits after 14 as guardian or bailiff, 123, 124, 125. Marriage doth not of right belong to the guardian; but if he do marry his ward, he must account for it, 123.

## Frankalmoine. Lib. 2. Cap. 6.

Frankalmoine.	The commencement of this tenure.	To whom lands may be so given to be holden, <i>scil.</i> to a man of the holy church, or to be a special corporation, 133, 134. By whom. By the king only, unless it be by prescription, or else before the statute of <i>quis emptores terrarum</i> , an. 18 Ed. 140.
	The continuance thereof.	How long, <i>scil.</i> so long as the privy continueth; for if . . .
		The tenancy to be alienated by tenant be in frankalmoine, or that the reversion cometh to another than the donor and his heirs, this tenure is determined, 139. 141. What service the tenant must do, <i>scil.</i> no terrene service, or other service certain, for then he is called tenant by divine service, 137; but in conscience he ought to make prayers for, &c. but is not compellable otherwise than by complaint to the ordinary visitor, 135, 136. 138. What advantage this tenure hath, <i>scil.</i> it draweth to it acquittal, 142.

## Homage Auncestell. Lib. 2. Cap. 7.

Homage Auncestell.	When it shall be called homage auncestell, <i>scil.</i> when it hath continued in the lineal descent of lord and tenant without alienation, 143. 147. and it may be either in socage or knight's service tenure, 152.	
	How it differeth from other services, <i>scil.</i> in	Acquittal, 144. Warranty, if the lord then being hath received homage of the tenant or his ancestors, else may the lord disclaim, 143. 145. And upon disclaimer the seignior is extinct, and the tenant shall hold of the lord next paramount, therefore an abbot or prior may not disclaim, 146.

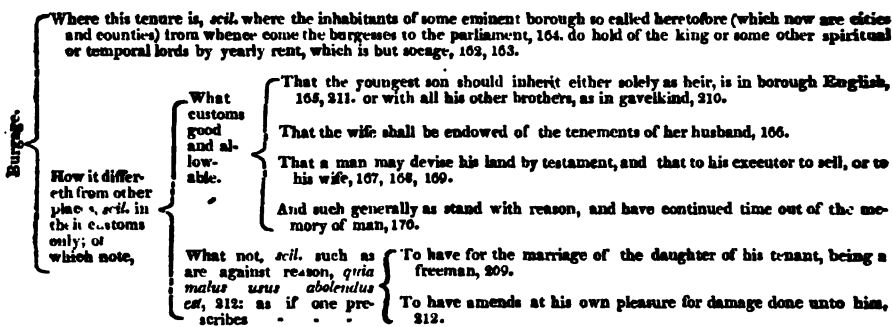
## Grand Serjeantie. Lib. 2. Cap. 8.

Grand Serjeantie.	The service wherein.	The several kinds thereof.	When one holdeth of the king to do some special service to the king (for the most part within the realm) 158. in proper person, 153. or by some other, 157. When one holdeth of the king by cornage, 156.
		The nature of it.	Called Grand Serjeantie, <i>quasi magnum seruitium</i> : can be held of none but of the king, 154. 156.
	The incidents thereto.	Ward, 158.	
		Marriage, 107, 108. Relief, which is the value of the land for a year <i>ultra reprimis</i> , 154.	

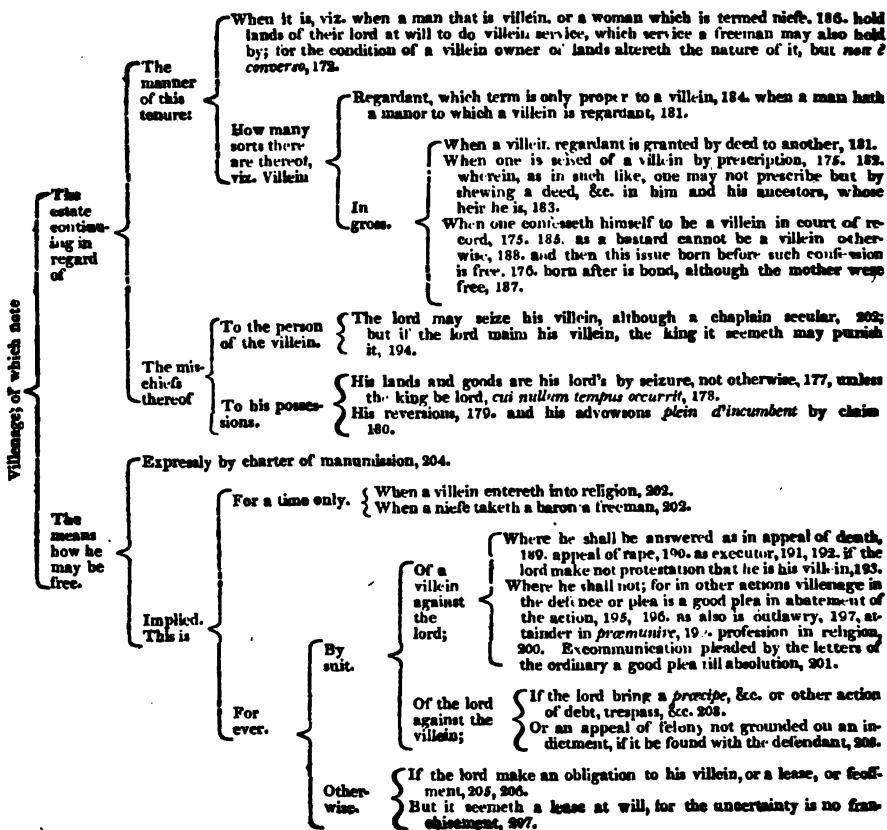
## Petit Serjeantie. Lib. 2. Cap. 9.

This is to render some small thing touching the war, as bow, arrow, &c. 159. which, although it be soage in effect, 160. yet it can be held of none but of the king, 161.

## Burgage. Lib. 2. Cap. 10.

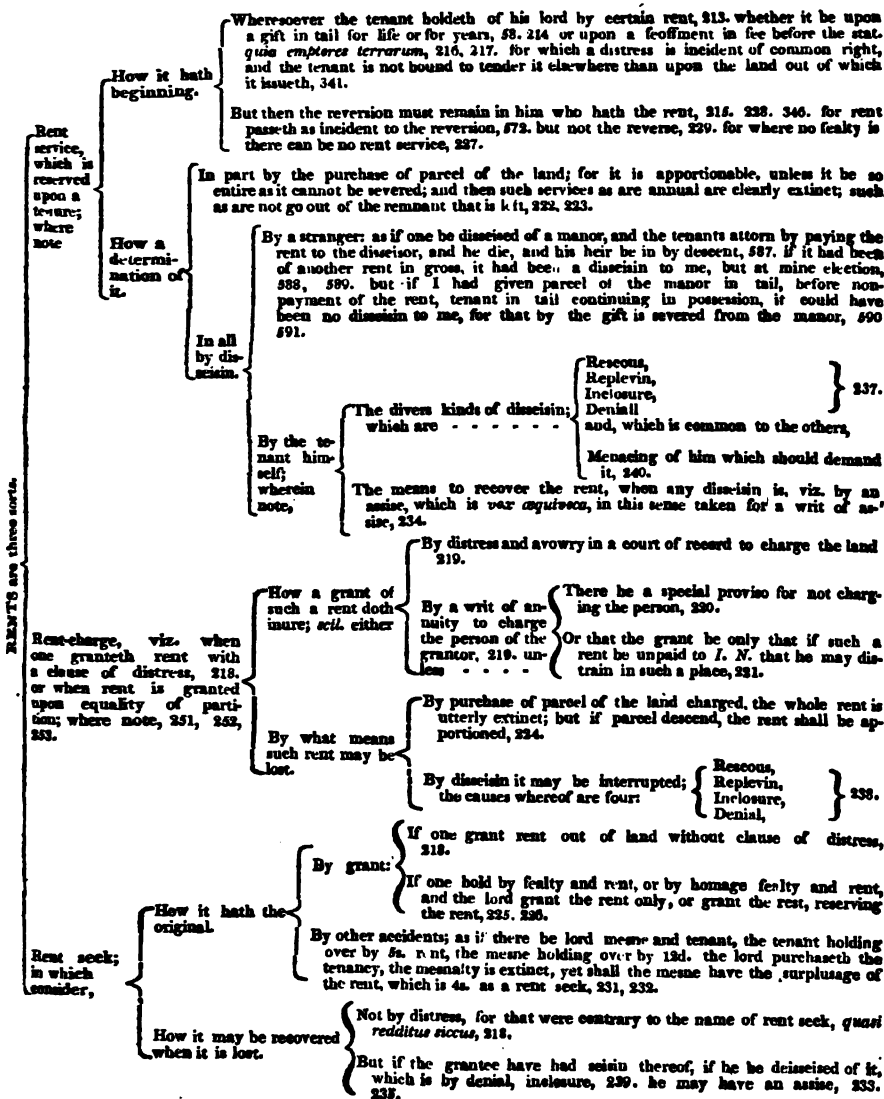


## Villinage. Lib. 2. Cap. 11.

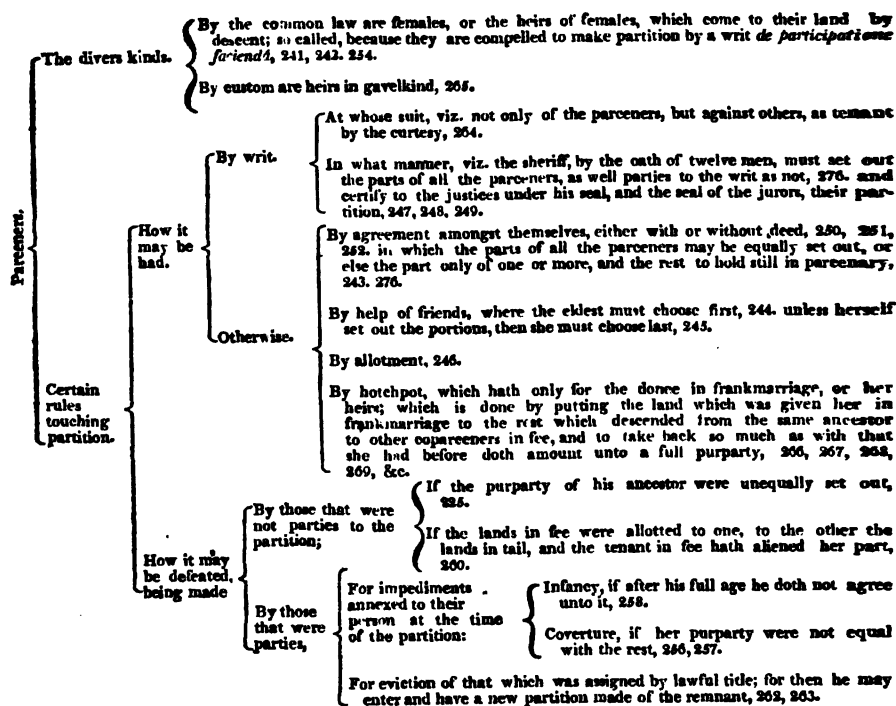




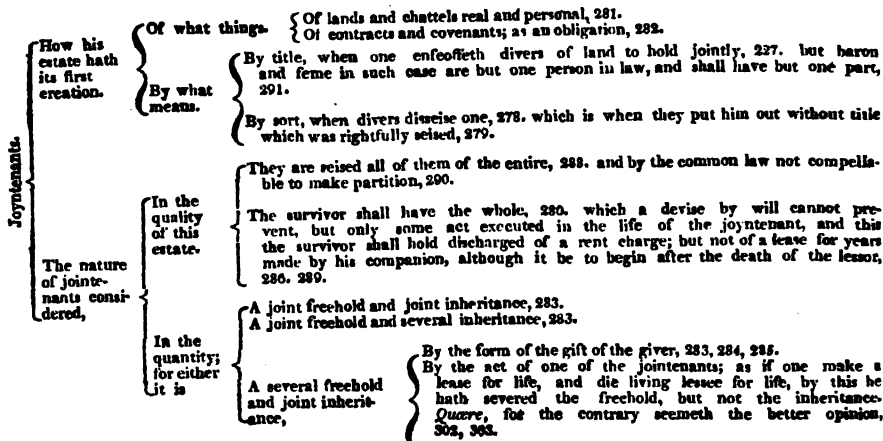
## Rents. Lib. 2. Cap. 12.



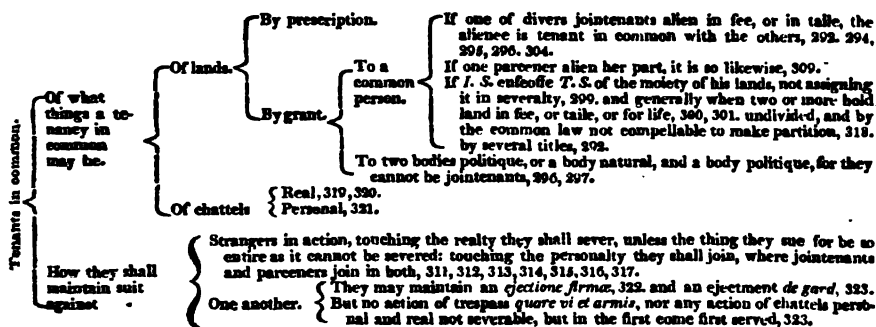
## Parceners. Lib. 3. Cap. 1. and 2.



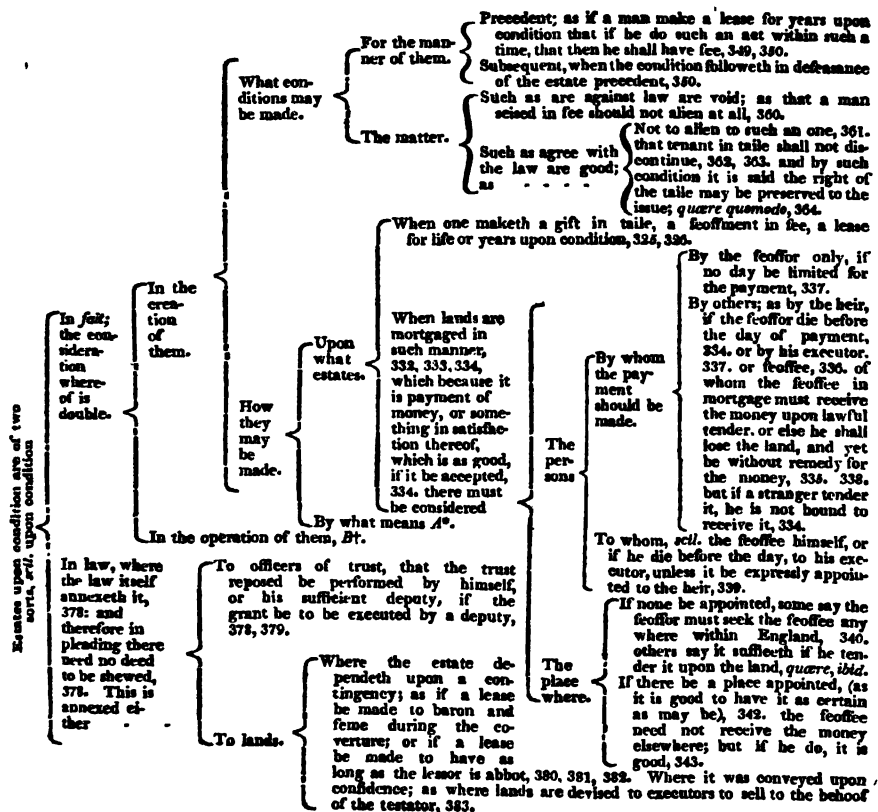
## Joyntenants. Lib. 3. Cap. 3.

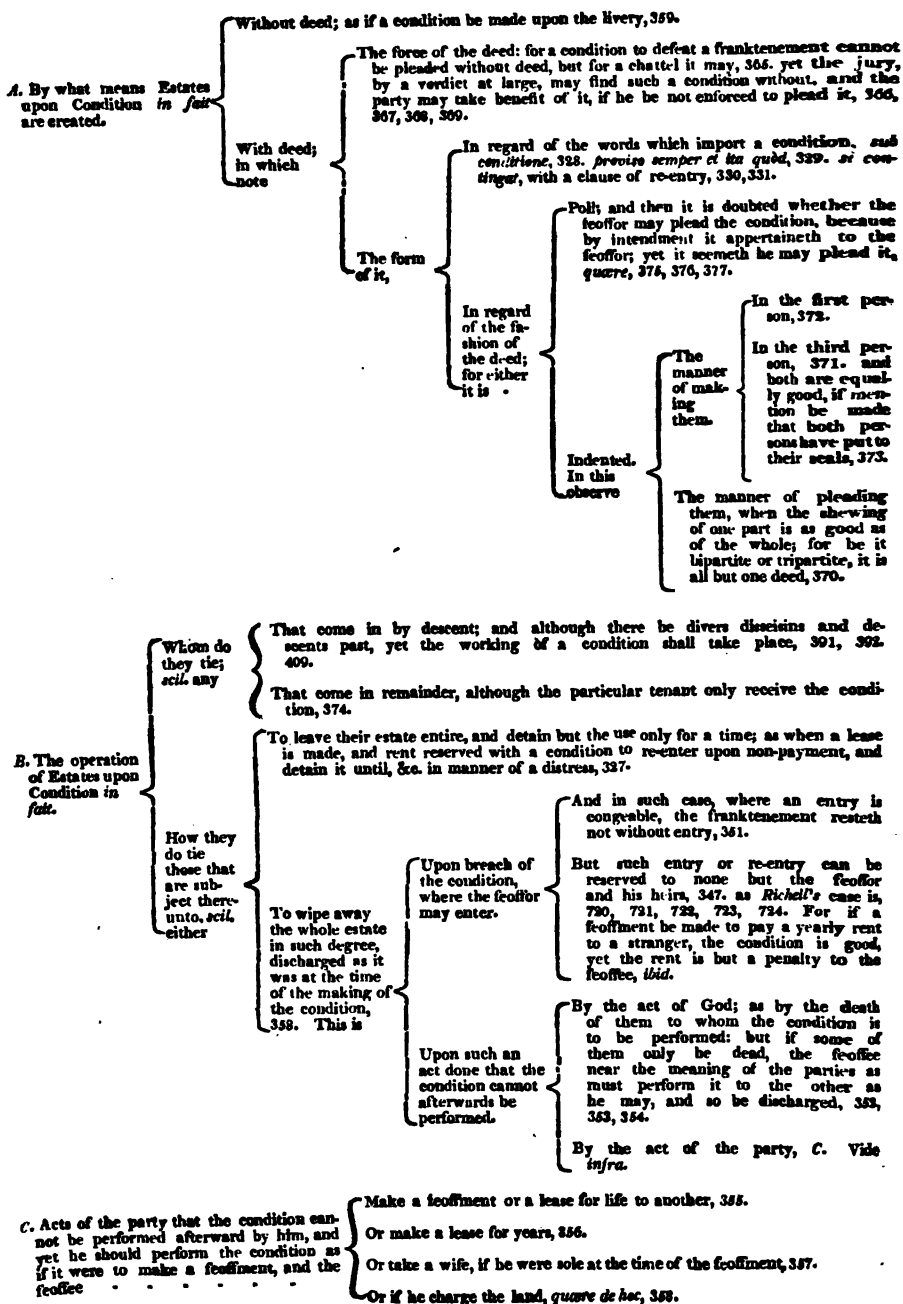


## Tenants in Common. Lib. 3. Cap. 4.



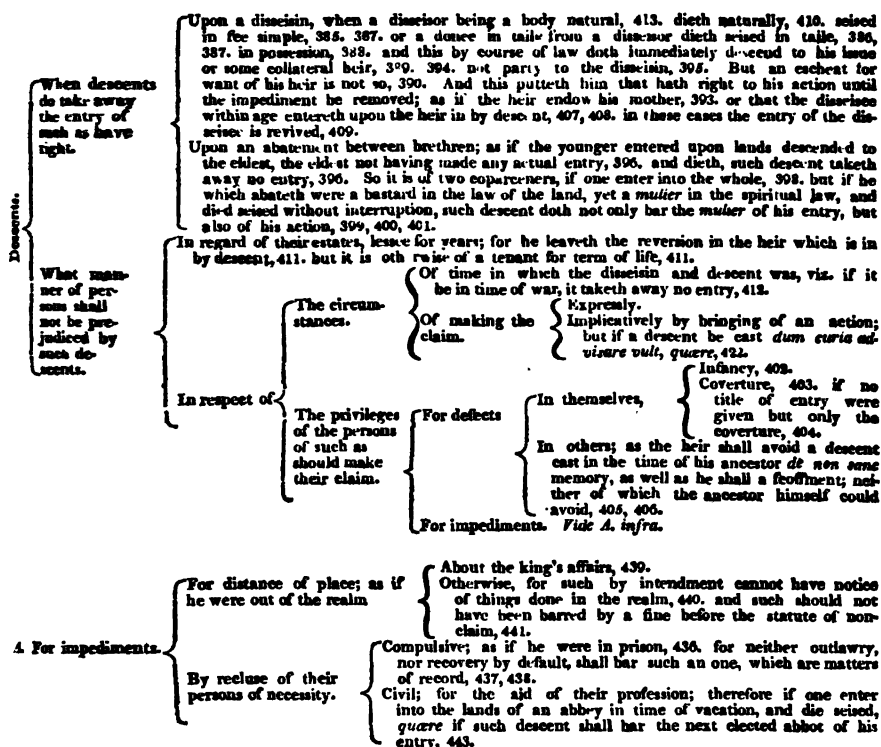
## Estates upon Condition. Lib. 3. Cap. 5.

\* For which *Vide* subsequent page.† For which also *Vide* subsequent page.

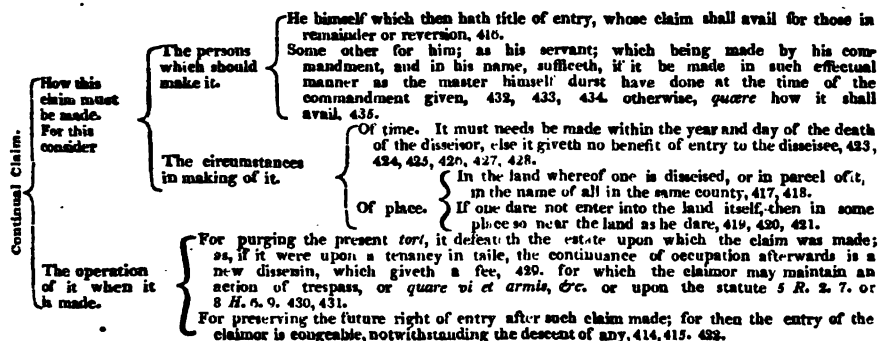
Estates upon Condition. Lib. 3. Cap. 5. *Continued.*

## Estates upon Condition. Lib. 3. Cap. 6. and 7. Continued.

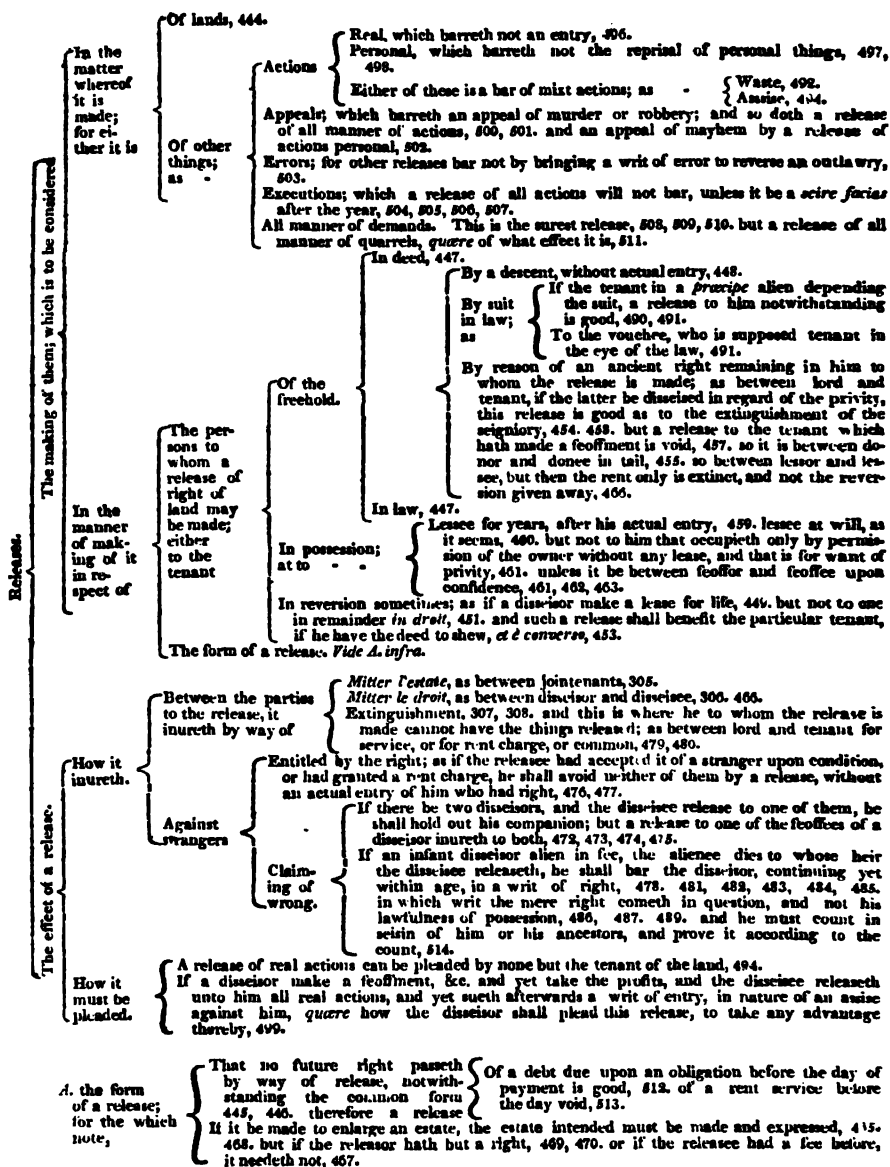
## Descents. Cap. 6.



## Continual Claim. Lib. 3. Cap. 7.



## Releases. Lib. 3. Cap. 8.



## Confirmation. Lib. 3. Cap. 9.

Confirmation.	The form of it, 515. in which these words <i>dedi et concessi</i> amount to as much as <i>confirmavi</i> , 531. which (as some others) inureth by way of extinguishment; as where the lord granteth his rent to the tenant, or the grant of a rent charge, 543, 544.	
	The force of it.	Where it enureth, viz. where there is such a possession before whereupon a confirmation may work; therefore if one take away my villein in gross, and I confirm his estate, it is void, 541, 542.
		How it inureth.
		To what purpose.
	In what manner.	Expressly. By implication; as if the heir of a disseisor being in by descent, the disseisee joineth with him in a feoffment, here is the confirmation only of the disseisee, and the feoffment of the other; but if the disseisee shall bring a writ of entry in the <i>per et cui</i> against the feoffee, <i>quare</i> how he shall plead this, 534. Merely to confirm an estate made before, which is the proper force of it; for <i>confirmare idem est quod firmum facere</i> ; as when disseisee confirmeth the estate of the disseisor, 519, 520, 521, 522. or of a lessee to a disseisor, or a rent-charge granted by a disseisor, though he after enter into the land, <i>quare de hoc</i> , 537. or when the lessor confirmeth the grant, 530, 547. or the lessee of his lessee, 516, 517. or when the lord confirmeth the estate of the tenant of the land where the seignory, rents, and common, remain notwithstanding, 535, 536, 537. or where the parson of a church chargeth his glebe by the confirmation of the ordinary or patron seized in fee, it is made perpetual, 528, 648. <i>quare</i> , whether the patron and chaplain may not do the like, 530.
	To confirm with some addition.	To commence presently, 524, 526, 533. To take effect by way of remainder, 523. where it is necessary to have these words, <i>aver et tener</i> , 525. but by neither or both a rent charge can be enlarged by confirmation, but by new grant upon surrender of the old; but the rent in case before may be, 548, 549. By enlarging the estate confirmed. By altering of it; as a lord by confirmation may diminish the services of his tenant, but not exchange them for other or reserve new, 538, 539. unless he alter it by frankalmoigne, which indeed is no corporal service, 540.

## Attornment. Lib. 3. Cap. 10.

Attornment.	Where it is needed.		<p>Wherever the lord, or he in reversion, grants the service of his tenant, or what lies in reversion by deed, 551, 568. Without attornment (which is nothing but a consent to the grant) made to the grantee in the life of the grantor, the grant is void; therefore, if one make two several grants to two several persons, he to whom the attornment is first made shall have it, 552. and a reversion barely granted without attornment settlcth not, 567. But if it be granted by fine, the reversion settlcth without attornment; but the converse cannot punish waste, or have relief, or other things lying in distress, without it, 579, 580, 581, 582. So they who claim by grant cannot avow without attornment, but such as claim by escheat, 583, 584. or by devise, may, 585, 586.</p>
	Unless	The party which should attorn	<p>Where one jointenant releaseth to another, there lessee need not attorn, 574. Where there is lease for life, the remainder for life, and the lessor releaseth in fee to him in the remainder, 575. Be the same person which granteth; for then he cannot attorn to his own grant, 578.</p>
		Where services be granted to the tenant, who hath as great estate in the tenancy as the grantor hath in the seignory; for there it inureth by way of extinguishment, 561.	
	By what person, viz. always by him who is tenant to the grantor; therefore	<p>Upon grants of seignories, the tenants of the manor must attorn, but not the tenants at will 553. If it be in lease, he in the reversion must attorn, for he is tenant to the lord, 554, 562. but he in remainder must not, for then the particular tenant is tenant <i>quant al faire avowry</i>, 557. and if there be mesne and tenant, the mesne must attorn, 556. Upon grant of a reversion, the tenant of the freehold, 571. and tenant in tail may attorn, but he is not compellable, 570. Upon grant of a remainder, the particular tenant, 569. Upon grant of a rent-charge, the tenant of the freehold, 556.</p>	
How it is made.	In what manner.	Expressly, 551. where the attornment by one jointenant, 566. or by one kind of service, if it be held by divers, 563, 564. is as effectual as if it were by all, because the seignory is entire.	
		<p>By accepting of the grant Of a reversion, 558, 559, 560. Of a remainder; as where the estate of the tenant for life is confirmed with a remainder, 573. By giving <i>un desier</i> as seisin of the rent, which includes an attornment, but not otherwise, 565. By re-entering into his term; as if lessor enter upon his lessee for years, or life, and make a feoffment, and the lessee re-enter, 576, 577.</p>	

## Warranty. Lib. 3. Cap. 13.

- Warranty.** { **The several kinds of it; which are,**
- Lineal,** where a man maketh a feoffment with warranty, and this descendeth to son; the cause of which name is not for the lineal descent of it, but because land should have lineally descended if such warranty had not been. 706. 716. The like is of the feoffment of the mother with warranty, 713, 714.
  - Collateral.** This is where he that maketh the warranty is collateral to the title; and he upon whom the warranty descendeth cannot convey the same land from the warranty, 706. 717; as
    - If the father disceiss the son, and after make a feoffment with warranty, 704.
    - If a man be disceissed of lands in fee, and have issue to sons, the youngest released with warranty, this is collateral to the eldest, 707, 708.
    - If the disceisee were of lands in tail, the warranty of the uncle is collateral, 719. And so a man have three sons, and entail his land to the eldest, with remainder to the second, 8 and the eldest doth discontinue with warranty, 716. 719. As it is of sons, so it is of daughters, 710.
  - Commencing by disceisin; as if the father, &c. being lessee for years, or at will, his sons, make a feoffment with warranty, 698. or if he be jointenant with his son, and make a feoffment of all the warranty, 700. So if a guardian in socage sheweth make feoffment, 699. So if a disceisee immediately make a feoffment with warranty, 706. or if one make a feoffment of the house of A. B. with warranty to burgess of the country, for fear of whom A. B. departeth the house, 701.
- The quality of it.** { **What words will make a warranty, viz. Warrantize only, 733.**
- What effect a warranty is of, viz. to bar or rebutt, &c. Vide A. Infra.**
- A. What effect a warranty is of, viz. to bar or rebutt, &c.; where note,**
- What warranties do bar, viz.**
    - Lineal,** for lands in fee, but not in fee tail without assets, 712.
    - Collateral** barreth both, but in cases especially provided, 713 as by the stat. of Gloucester the warranty of the tenant by the curtesy barreth not without assets, although it be by fine levied by the husband only, 724. 728, 729, 730, 731, 732. But tenant in dower or for life are not within the statute's compass, 728 yet if such warranty descend upon an infant, he shall not be barred, 726.
    - Commencing by disceisin doth never bar, 697.
  - Whom they bar, viz. none but those upon whom they do depend; therefore they must needs attach in the ancestor, and the warranty by devise barreth not, 726 and warranty doth descend always upon the heir, therefore it never descend upon the brother of the half-blood, 737. nor where the blood is corrupted, 745, 746 747, at the common law; not by custom, as borough English, or gavelkind, 718. 731 736.**
  - How long they bar, viz. until**
    - The estate whereunto they be annexed be**
      - At an end, 738.
      - Defeated, 741, 742, 743, 744.
    - The warranty be released, and he on whom the warranty doth descend hath the release to shew, 748.**

END OF THE ANALYSIS OF LITTLETON.



THE  
FIRST PART  
OF THE  
INSTITUTES  
OF THE  
LAWS OF ENGLAND.

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Cap. I.

Fee simple.

Sect. I.

[1. a.] **T***ENANT* en fee simple est celuy que ad terres ou tenements a tener a luy et a ses heires a tous jours. Et est appel en Latin, feodum simplex, quia feodum idem est quòd hæreditas (1), et simplex idem est quòd legitimum vel purum. Et sic feodum simplex idem est quòd hæreditas legitima, vel hæreditas pura. Car si home voile purchaser terres ou tenements en fee simple, il covient de aver ceux parolx en son purchase, *A aver et tener a luy et a ses heires : car ceux parolx (ses heires) font l'estate d'enheritance.* Car si home purchase terres per ceux parolx, *A aver et tener a luy a tous jours ; ou per tiels parols, A aver et tener a luy et a ses assigns a tous jours : en ceux deux cases il ny ad estate forsque pur terme de vie, pur ceo que il fault ceux parols*

(1) [See N. 1.]

(ses

**T***ENANT* in fee simple is he which hath lands or tenements to hold to him and his heires for ever. And it is called in Latin, *feodum simplex*, for *feodum* is the same that inheritance is, and *simplex* is as much as to say, lawfull or pure. And so *feodum simplex* signifies a lawfull or pure inheritance. For if a man would purchase lands or tenements in fee simple, it behooveth him to have these words in his purchase, To have and to hold to him and to his heires : for these words (his heires) make the estate of inheritance. For if a man purchase lands by these words, To have and to hold to him for ever ; or by these words, To have and to hold to him and his assigns for ever : in these two cases he hath but an estate for term of life, for that there lacke these words

(his

(ses heires), les queux parolx tant seulement font l'estate d'inheritance en tous feoffments et grants.      (his heires), which words onely make an estate of inheritance in all feoffments and grants.

Vide Sect. 88.

"TENANT," in Latin *tenens*, is derived from the verbe *teneo*, and hath in the law five significations. 1. It signifies the estate of the land: as when the tenant, in a *præcipe* of land, pleads *quod non tenet*, &c. this is as much as to say, that he hath not seisin of the freehold of the land in question. And in this sense doth our author take it in this place: and therefore he saith, tenant in fee simple is he which hath lands to hold to him and his heires. 2. It signifieth the tenure or the service whereby the lands and tenements be holden; and in this sense it is said in the writ of right, *que clamat tenere de se per liberum servitium*, &c. And in this signification he is called a tenant or holder; because all the lands and tenements in England, in the hands of subjects, are holden mediately or immediately of the king (1). For in the law of England we have not [1. b.] properly, *allodium*, that is, any subjects land that is not holden; unless you will take *allodium* for *ex solido*, as it is often taken in the Booke of *Domesday* (2): and tenants in fee simple are there called *alodarii* or *aloarii*. And he is called a tenant, because he holdeth of some superior lord by some service. And therefore the king in this sense cannot be said to be a (3) tenant, because he hath no superior but God Almighty; *pradium domini regis est directum dominium, cujus nullus auctor est nisi Deus*. And, as Bracton saith, *Omnes quidem sub eo, et ipse sub nullo, nisi tantum sub Deo*. The possessions of the king are called *sacra patrimonia*, and *dominica corona regia*. But though a subject hath not properly *directum*, yet hath he *utile dominium*. Of these tenants our author speaketh in his second booke. 3. Also, *tenere* signifieth performance, as in the writ of covenant, *quod teneat conventionem*, that is, that he hold or performe his covenant. 4. And likewise it signifieth to be bound, as it is said in every common obligation, *teneri et firmiter obligari*. Lastly, it signifieth to deeme or judge; as in 38 E. 3. c. 4. it shall be holden for none; (that is) judged or deemed for none; and so we commonly say, it is holden in our bookes. And these several significations doe properly belong to our tenant in fee simple. For he hath the estate of the land, he holdeth the land of some superiour lord, and is to perform the services due, and thereunto he is bounden by doome and judgement of law. Of the severall estates of land our author treateth in his first booke: and beginneth with fee simple, because all other estates and interests are derived out of the same.

Brit. fo. 83.  
207. 208.

Fleta, lib. 5. cap.  
5 and lib. 3. cap. 8.  
Bract. lib. 4. 263.  
(4 Inst. 302.) Domesday. Mir. des Just. cap. 3. sect. 18. 17.

Bract. lib. 2.  
cap. 5, 6, 7.

"Fee simple." Fee (4) commeth of the French *fief*, (i.e.) *pradium beneficiarium*, and legally signifieth inheritance, as our author himselfe

(1) Same doctrine, 50. Ass. pl. 1. post. 65. Plowd. 498. The origin and principle of this doctrine is well explained in Wright's Ten. 58. and 2 Blackst. Comm. 48. ed. 5. See also Wright's Ten. 137. and Mad. Baron. Anglic. 25.

(2) See post. 5. a. For particulars concerning *Domesday* Book, see the books cited in Wright's Ten. 56. in note p. and also an Account of *Domesday* Book, and an

Account of Danegeld, both printed by order of the Antiq. Soc. in 1736.

(3) For examples and consequences of this doctrine, see Dy. 154. Plowd. 212. post. 16. a. 6. Co. 5. b. Finch, fol. ed. 7. 2 Ro. Abr. 513, 514. Post. 2. b. n. 4.

(4) For the derivation of the word *Fief*, see Wright's Ten. 3. and the books there cited.

selfe hereafter expoundeth it. And simple is added, for that it is descendible to his heires generally, that is, simply, without restraint to the heires of his body, or the like. *Feodum est quod quis tenet ex quacunque causâ sive sit tenementum, sive redditus, &c.* In Domesday it is called *feudum*. [a] Of fee simple, it is commonly holden that there be three kinds, viz. fee simple, absolute, fee simple conditionall, and fee simple qualified, or a base fee (5). But the more genuine and apt division were to divide fee, that is, inheritance, into three parts, viz. simple or absolute, conditionall, and qualified or base. For this word (simple) properly excludeth both conditions and limitations, that defeat or abridge the fee. \* Hereby it appeareth, that fee in our legal understanding signifieth, that the land belongs to us and our heires, in respect whereof the owner is said to be seised in fee; and in this sense the king is said to be seised in fee. [b] It is also taken as it is holden of another by service, and that belongeth onely to the subject; *Item dicitur feodum alio modo ejus qui a iuramento scoffat, et quod quis tenet ab alio, ut si sit qui dicitur, talis tenet de me tot feoda per servitium militare.* And Fleta saith, *Poterit unus tenere in feodo quoad servitium, sicut dominus capitalis, et non in dominico; aliis in feodo et dominico, et non in servitio, sicut liberè tenens alicujus.* [c] And therefore if a stranger claim a seigniorie, and distreyne and avow for the service, the tenant may plead, that the tenancy is *extra feodum, &c.* of him, (that is) out of the seigniorie, or not holden of him that claimeth it; but he cannot plead, *extra feodum, &c.* unlesse he take the tenancy, that is, the state of the land upon him. Of fee in the first sense our author treateth in this first booke; and as it is taken in the second sense, in his second booke; and of the third you shall read in our author, Sect. 13. 643, 644, 645. and plentifully in our books quoted in the margin.

Detr. Plas. 152. 216.)

"*Terres ou tenements.*" Here it is to be observed, that a man may have a fee simple in three kinds of hereditaments, (6) viz. reall, personall, and mixt. Reall, as lands and tenements, whereof our author here speaketh. Personall, as king Edward the first, in the thirteenth yeare of his raigne, *concessit Edmundo fratri suo charissimo, quod ipse et heredes sui habeant, ad requisitionem suam, in*

[2. a.] *cancellariâ nostrâ et hereditum nostrorum, justiciarios ad placita forestarum, quas idem frater noster habet ex dono domini regis Henrici patris nostri, secundum assis, foresta tenend,' &c.* In this case the grantee and his heires had a personall inheritance in making of a request to have letters patents of commission to have justices assigned to him to heare and determine of the pleas of the forrests, and concerneth neither lands or tenements. And so it is if an annuity be granted to a man and his heires, it is a fee simple personall: (1) *et sic de similibus.* And lastly, hereditaments mixt both of the reality and personalty. As the abbot of Whitbye in the county of Yorke having a forrest of the gift of William of Percie founder

Brit. cap. 34.  
fo. 89.  
Flet. lib. 3. cap.  
2. 8. & 9. &  
lib. 5. cap. 5.  
[c] Bract. fo.  
253. & 207.  
Pl. Com. in  
Wals. Cas.  
7 H. 4. 45.  
8 H. 4. 15.  
18 H. 8. 3. b.  
27. Am. 33.  
17. Am. 5.  
18 E. 3. 46.  
24 E. 3. 38.  
9 E. 4. 18.  
16 H. 7. 4.  
10 E. 3. Ac-  
count 60. 32.  
R. 2. Dine. 60.  
12 E. 4. 3.  
15 E. 4. 8. Dy.  
8 El. 252, 253.  
12 H. 8. 8.  
4 H. 7. 2. The  
case of a person  
which hath a  
qualified fee, see  
in the title of  
Dene.  
\* Vide Sect. 4.  
[b] Bract. lib. 4.  
fo. 203.  
Flet. lib. 5. cap. 5.  
Brit. fo. 206. 207.  
[c] 2. Am. p. 4.  
12. Am. 38.  
13 E. 3. tit.  
Hori de son the, 28.  
28. Am. 41.  
7 H. 4. 30.  
2 H. 6. 1.  
(9. Co. 30. & 34.  
3. Inst. 300.  
Cro. Jan. 127.  
Hob. 108.

Rot. pat.  
13 E. 1.  
(4. Inst. 314.  
Cro. Ju. 156.)

[5] See the same division of fee in 10. Co. 97. b. 2 Inst. 96. Vaugh. 273. 2. L. Raym. 1148. and for instances of a qualified fee, see post. 27. Plowd. 557. 10. Co. 97. 7 E. 4. 12. a. Cro. Ch. 430.

Hardr. 147.

[6] For the extent of the word *hereditament*, and the difference between *that* and *tenement*, see post. 6. a.

[1] [See N. 2.]

Ro. Pat. an.  
47 H. 3. Itin.  
Pickering, 8 E.  
3. Ro. 42.

founder of that abby, and by the charters of king John and of other his progenitors, king Henry the third did grant *abbati et conventui de Whitbye, quod ipsi et eorum successores in perpetuum habeant viridarios suos proprios de libertate sua de Whitbye eligend' de cetero in pleno com. Eborum, prout moris est, ad responsiones et presentationes faciend' de transgressionibus, quas a modo fieri continget de venatione intra metas forestæ suæ de Whitbye, quam habent ex donatione Willi. de Percey et Alani de Percey filii ejus, et redditione et concessione domini Johannis quondam regis Angliæ patris nostri, et confirmatione nostrâ, coram justiciariis nostris itinerantibus ad placita forestæ in partibus illis et non alibi sicut viridarii forestæ nostræ hujusmodi responsiones et presentationes facere debent, et consueverunt. Et si contingat aliquos forenaecos, qui non sunt de libertate prædictorum abbatis et conventus, transgressionem facere de venatione intra metas forestæ prædictæ, quos prædicti viridarii attachiare non possunt, Volumus et concedimus pro nobis et heredibus nostris quod hujusmodi transgressores per justiciarios forestæ nostræ ultra Trentam attachientur, ad presentationem viridariorum prædict. ad respondendum inde coram justiciariis nostris itinerantibus ad placita forestæ nostræ in partibus illis, cum ibid. ad placitandum venerint prout secundum assisam et consuetudinem forestæ nostræ fuerint faciend'. Which charter was pleaded upon the claime made by the abbot of Whitbye before Willoughby, Hungerford, and Hanbury, justices in eire in the forrest of Pickering, which eire began anno 8 E. 3. And these before them were allowed. And when the king created an earl of such a county or other place, to hold that dignity to him and his heire, this dignity is personall, and also concerneth lands and tenements. (3) But of this matter more shall be said in the next Chapter, Sect. 14. and 15.*

(¶ Ca. 33.)

Bract. lib. 4.  
cap. 9. fo. 263.  
Brit. cap. 32.  
2c. 79.  
For interpretation  
of words and  
etymologies, vid.  
Sect. 9. 18. 105.  
116. 119. 135.  
164. 164. 174.  
184. 186. 194.  
204. 234. 267.  
268. 332. 337.  
424. 520. 592. 645. 689. 733.

"*Et est appel en Latin feodum simplex, quia feodum idem est quod hereditas.*" Here Littleton himselfe teacheth the signification of *feodum*, according to that which hath been said, which only is to be applied to fee simple pure and absolute. And this and all his other interpretations of words and etymologies throughout all his three bookes (wherein the studious reader will observe many) are perspicuous and ever *per notiora, et nunquam ignotum per ignotius*; and are most necessary, for *ignoratis terminis ignoratur et ars.*

Bract. lib. 3.  
cap. 30. fo. 62.  
68. b. lib. 4.  
cap. 28.  
Fleta, lib. 3.  
cap. 8.  
Bract. lib. 2.  
cap. 5. 8c.  
Brit. cap. 34.

"*Simplex idem est quod legitimum vel purum.*" Hereof he treateth onely in this place. And Littleton saith well, that *simplex idem est quod purum. Simplex enim dicitur quia sine plicis; et purum dicitur, quod est merum et solum sine additione. Simplex donatio et pura est, ubi nulla addita est conditio sive modus; simplex enim datur, quod nullo additamento datur.*

Fleta, lib. 3. ca. 3.  
Hoved. 58. b.

"*Hereditas legitima vel hereditas pura.*" And therefore it is well said, *quod donationum alia simplex et pura, quæ nullo jure civili vel naturali cogente, nullo precedente metu vel interveniente, ex mera gratuitæque liberalitate donantis procedit, et ubi nullo casu velit donator ad se reverti quod dedit; alia sub modo, conditione, vel ob causam, in quibus casibus non propriè fit donatio, cum donator id ad se reverti velit, sed quædam potius feodalis dimissio; alia absoluta et larga; alia stricta et coarctata, sicut certis heredibus, quibusdam à successione exclusis,*

(3) Therefore such dignity has been adjudged to be intailable within the statute *de donis. Sec post. 20. a.*

*exclusis, &c.* And therefore seeing fee simple is *hereditas legitima vel pura*, it plainly confirmeth that the division of fee is by his authority rather to be divided as is aforesaid than fee simple. And he saith well in the disjunctive, *legitima vel pura*, for every fee simple is not *legitimum*. For a disseisor, abator, intruder, usurper, &c. have a fee simple, but it is not a lawfull fee. So as every man that hath a fee simple, hath it either by right or by wrong. If by right, then he hath it either by purchase or descent. If by wrong, then either by disseisin, intrusion, abatement, usurpation, (3), &c. In this Chapter he treateth onely of a lawfull fee simple, and divideth the same as is aforesaid.

"*Cur si home purchase.*" Persons capable of purchase are of two sorts, persons natural created of God, as *I. S. I. N. &c.* and persons incorporate or politique created by the policy of man (and therefore they are called bodies politique); and those be of two sorts, *viz.* either sole, or aggregate of many; again, aggregate of many, either of all persons capable, or of one person capable, and the rest incapable or dead in law, as in the Chapter of Discontinuance, Sect. 653, shall be shewed. Some men have capacitie to purchase, but not ability to hold: some capacity to purchase, and ability to hold or not to hold, at the election of them or others: some capacitie to take and to hold: some, neither capacitie to take nor to hold: and some, specially disabled to take some particular thing.

[2. b.] If an alien Christian or infidel purchase houses, lands, tenements, or hereditaments to him and his heires, albeit he can have no heires, yet he is of capacitie to take a fee simple (1) but not to hold (2). For upon an office found, the king shall have it by his prerogative (3), of whosoever the land is holden (4). And so it is if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the king (5). If an alien purchase any estate of freehold in houses, lands, tenements, or hereditaments, the king upon office found shall have them. If an alien be made a denizen and purchase land, and die without issue, the lord of the fee shall have the escheat, and not the king. But as to a lease for yeares, there is a diversitie betweene a lease for yeares of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for yeares of lands, meadows, pastures, woods, and the like. For if he take a lease for yeares of lands, meadows, &c. upon office found, the king shall have it (6). But of a house for habitation he may take a lease for yeares as incident to commerce; for without habitation he cannot merchandize or trade (7). But if he depart, or relinquish the realme, the king shall have the lease. So it is if he die possessed thereof, neither his executors or administrators shall have it, but the king (8); for he had it only for habitation as necessary to his trade

Persons capable of purchase.

Who have ability to grant.  
Vide Sect. 57.

11 Eliz.  
Dier 283.  
11 H. 4. 20.  
& 20.  
7 E. 4. 20.  
(1 Ro. Abr.  
194)

32 Hen. 6. 20.  
Pl. Com. 483.

5. Mar. Br. tit.  
Denizen. 22.

(3) For the difference between such estates by wrong, see post. 277. a. and that they cannot be said to be by purchase, see post. 3. b. & 18. b.

[2. b.]

- (1) [See N. 3.]
- (2) [See N. 4.]
- (3) [See N. 5.]

(4) [See N. 6.]

(5) See in Plowd. 229. several cases, in which, for a like reason, the king is intitled without office.

(6) Accord. 7. Co. Calvin's case, Dy. 2. b. in marg.

(7) [See N. 7.]

(8) [See N. 8.]

Pasch. 29 Eliz.  
in Sir James  
Croft's case.  
40. Ass. pl. 2.  
40 E. 3. 11.  
(1. Co. 52. b.)

Magna Charta,  
cap. 30.  
7 E. 1. stat. 2.  
de Religiosis.  
W. 2.  
13 E. 1. cap. 33.  
15 R. 2. cap. 5.  
23 H. 8. cap. 10.  
29 Ed. cap. 5.  
23 H. 3.  
Ass. 436.  
29. Ass. p. 17.  
Brit. fo. 32.  
Fleta, lib. 3.  
cap. 4. & 5.  
19 E. 2. tit.  
Vill. 34.  
20 E. 3. Ibid. 13.  
21 E. 3. 4.  
4 H. 6. 9.  
19 H. 6. 63. 64.  
3 E. 4. 14.  
19 E. 3.  
Mortm. 8.  
34 H. 6. 37.  
19 H. 6. 63.  
(Plowd. 502. a.)  
7 E. 4. 14.

\* Pl. Com. 103.  
in Wrotteley's  
case.  
Le statut de  
Religiosis.  
7 E. 1. st. 2.

(Cro. Ja. 320.  
1 Ro. Abr. 731.)

trade or traffique, and not for the benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for yeares, albeit it were for his habitation (9); and so it is if he be an alienemie. And all this was so resolved by the judges assembled together for that purpose in the case of sir James Croft, Pasch. 29 of the raigue of queene Elizabeth. Also, if a man commit felony, and after purchase lands, and after is attainted, he had capacitie to purchase, but not to hold it; for in that case the lord of the fee shall have the escheat (10); and if a man be attainted of felony, yet he hath capacitie to purchase to him and to his heires, albeit he can have no heire, but he cannot hold it; for in that case the king shall have it by his prerogative, and not the lord of the fee; for a man attainted hath no capacitie to purchase (being a man *civiliter mortuus*) but onely for the benefit of the king, no more than the alien-née hath. If any sole corporation or aggregate of many, either ecclesiasticall or temporall (for the words of the statute be *ei quis religiosus vel alius*) purchase lands or tenements in fee, they have capacitie to take but not to retaine (unlesse they have a sufficient licence in that (11) behalfe); for within the yeare after the alienation, the next lord of the fee may enter; and if he doe not, then the next immediate lord from time to time to have half a yeare; and for default of all the meane lords, then the king to have the land so aliened for ever, which is to be understood of such inheritance as may be holden. But of such inheritances as are not holden, as villeines, rent charges, commons, and the like, the king shall have them presently by a favourable interpretation of the statute. An annuity graunted to them is not mortmaine, because it chargeth the person only. Some have said that it is called mortmaine, *manus mortua, quia possessio eorum est immortalis, manus pro possessione, et mortua pro immortalis*, and the rather, for that by the laws and statutes of the realme, all ecclesiastical persons are restrained to alien. \* Others say it is called *manus mortua per antiphrasin*, because bodies politique and corporate never die. Others say that it is called mortmaine by resemblance to the holding of a man's hand that is ready to die, for what he then holdeth he letteth not goe till he be dead. These and such others are framed out of wit and invention; but the true cause of the name, and the meaning thereof, was taken from the effects, as it is expressed in the statute itself, *per quod quæ servitia ex hujusmodi feodis debentur, et quæ ad defensionem regni ab initio provisæ fuerunt, indebitè subtrahuntur, et capitales domini coactas suas amittunt*, so as the lands were said to come to dead hands as to the lords, for that by alienation in mortmaine they lost wholly their escheats, and in effect their knights-services for the defence of the realme, wards, marriages, relieves, and the like; and therefore was called a dead hand, for that a dead hand yeeldeth no service.

I passe over villeins or bondmen, who have power to purchase lands, but not to retheyne them against their lords, because you shall reade at large of them in their proper place in the Chapter of Villenage.

An infant or *minor* (whom we call any that is under the age of 21 yeares) hath, without consent of any other, capacity to purchase, for it is intended for his benefit, and at his full age he may either agree

(9) [See N. 9.]  
(10) [See N. 10.]

(11) As to this, see post. 98. 2.

agree thereunto, and perfect it, or without any cause to be alledged, waive or disagree to the purchase; and so may his heires after him, if he agreed not thereunto after his full age.

A man of non-sane memory may, without the consent of any other, purchase lands, but he himself (12) cannot waive it; but if he die in his madness, or after his memory recover, without agreement thereunto, his heire may waive and disagree to the state, without any cause shewed; and so of an ideot. But if the man of non-sane memory recover his memory, and agree unto it, it is unavoydable.

If an abbot purchase lands to him and his successors without the consent of his convent, he himself cannot waive it, but his successor may upon just cause shewed; as if a greater rent were reserved thereupon than the value of the land, or the like; but he cannot waive it unlesse it be upon just cause, *et sic de similibus, prelatius ecclesie sue conditionem meliorare potest, deteriorare nequit.* And in another place he saith, *Est enim ecclesia ejusdem conditionis,*

[3. a.] *que fungitur vice minoris.* But no simile holds in every thing, according to the ancient saying, *Nullum simile quatuor pedibus currit* [a]. An hermaphrodite may purchase according to that sexe which prevailleth. A feme covert cannot take any thing of the gift of her husband (1), but is of capacity to purchase of others without the consent of her husband. And of this opinion was Littleton in our books, and in this book, Sect. 677, but her husband may disagree thereunto, and devest the whole estate; but if he neither agree nor disagree, the purchase is (2) good; but after his death, albeit her husband agreed thereunto, yet she may without any cause to be alledged waive the same, and so may her heires also, if after the decease of her husband she herself agreed not thereunto.

[b] A wife (*uxor*) is a good name of purchase, without a Christian name; and so it is if a Christian name be added and mistaken, as *Em* for *Emelyn*, &c. *for utile per inutile non vitiatur.* But the queene, the consort of the king of England, is an exempt person from the king by the common law, and is of ability and capacity to purchase, and grant without the king. Of which see more at large, Sect. 200.

E. 4. 42. 13 E. 3. Escaped 321.

[c] The parishioners or inhabitants, or *probi homines* of Dale (3), or the churchwardens, are not capable to purchase lands; but goods they are, unlesse it were in ancient time when such grants were allowed (4).

[d] An ancient grant by the lord to the commonners in such a waste, that a way leading to their common should not be straitened, was good; but otherwise it is of such a grant at this day [e]. And so in ancient time a grant made to a lord, *et hominibus suis, tam liberis quam nativis*, or the like, was good; but they are not of capacity to purchase by such a name at this day. But yet at this day if the king grant to a man to have the goods and chattels *de hominibus suis, or de tenentibus suis, or de residentibus infra feodum*, &c. it is good: for there they are not named as purchasers or takers, but

43 Ass. p. 22.

Execut. lib. 2.  
2. 12. & 32.

[a] 1 H. 7. 15.  
7 H. 4. 17.  
18 H. 6. 2.  
9 E. 3. 30.  
15 ... 4. fol. 1. b.  
27 H. 8. 24.  
(Hob. 304.)  
5. Co. 119. b.)

[b] A name of purchase.  
2 H. 4. 25.  
1 H. 5. 8.  
46 E. 3. 22.  
12. Ass. 18.  
30 E. 3. 18.  
F. N. B. 97. p.  
1. Ass. 11.  
11 H. 4. 33.

[c] 12 H. 7. 2.  
37 H. 6. 30.  
10 H. 4. 3. b.  
(4. Inst. 297.)

[d] 32 E. 3.  
barre, 261.  
(Hob. 26.)  
6. Co. 69.)  
[e] 33 E. 3.  
grant 83.  
18 E. 3. 50.  
12. Ass. 35.  
14 H. 6. 12.  
34. Ass. p. 11.  
40. Ass. p. 21.

(12) [See N. 11.]

(1) [See N. 12.]

(2) Acc. post. 356. a.

(3) See in Dy. 100. the case of a grant

by the crown *probi hominibus de Islington.*  
rendering a rent.

(4) See N. 13.]

[f] Bract. lib. 4.  
tract. 1. ca. 30.  
Britton, fol. 121.  
22. 3 H. 3. 78.  
25 E. 3. 43.  
26. Ass. 61.  
30. Ass. 16.  
46 E. 3. 22.  
39 E. 3. 17.  
3 H. 6. 25.  
29 H. 6. 2.  
30 H. 6. 1.  
34 H. 6. 19.  
21 H. 4. 27.  
9 E. 4. 29.  
6 E. 4. 40. 65.  
24 H. 7. 11.  
20 Eliz.  
Dier 259.  
8 E. 3. 436.  
30 E. 3. 25.  
28 E. 3. 32.  
Fitzjohn.  
23 E. 4. 8.  
Moh. 22.

1 H. 4. 4. 3 H. 6. 26. 19 H. 6. 2. 34 H. 6. 19. 5 E. 4. 55. 27 H. 8. 11. 1 H. 5. 5.  
27 E. 3. 28. 8 E. 3. 437. 7 H. 6. 29. 9 H. 5. 9. [g] 40 E. 3. 22. Fitzwilliam. 24 E. 3. 64.  
Fitzrobert. 27 E. 3. 85. tit. grant. 67. 18 E. 3. 23, 24. 18 E. 4. 8. b. 14 H. 7. 31, 32.  
39 E. 3. 24. Vouch. 179. 37 E. 3. 85. where the proper name is mistaken. (6. Co. 65. 10. Co. 132. b.  
1. Ro. Abr. 44. Mo. 233.)

but for another man's benefit, who hath capacity to purchase or take [f]. And regularly it is requisite, that the purchaser be named by the name of baptism and his surname, and that special heed bee taken to the name of baptism; for that a man cannot have two names of baptism as he may have divers surnames (5). [g] And it is not safe in writs, pleadings, grants, &c. to translate surnames into Latin. As if the surname of one be Fitzwilliam, or Williamson, if he translate him *Filius Willi*, if in truth his father had any other Christian name than William, the writ, &c. shall abate; for Fitzwilliam or Williamson is his surname, whatsoever Christian name his father had, therefore the lawyer never translates surnames. And yet in some cases, though the name of baptisme be mistaken (as in the case before put of the wife), the grant is good.

So it is if lands be given to Robert earl of Pembroke where his name is Henry, to George Bishop of Norwich where his name is John, and so of an abbot, &c. for in these and the like cases there can be but one of that dignity or name. And therefore such a grant is good, albeit the name of baptism be mistaken. If by licence lands be given to the deane and chapter of the holy and undivided Trinity of Norwich, this is good, although the deane be not named by his proper name, if there were a deane at the time of the grant; but in pleading he must shew his proper name. And so on the other side, if the deane and chapter make a lease without naming the deane by his proper name, the lease is good, if there were a deane at the time of the (6) lease; but in pleading, the proper name of the deane must be shewed; and so is the booke of 18 E. 4. to be intended; for the same judges in 13 E. 4. held the grant good to a maior, aldermen, and commonalty, albeit the maior was not named by his proper name; but in pleading it must be shewed, as is there also holden (7). If a man be baptized by the name of Thomas, and after at his confirmation by the bishop he is named John, he may purchase by the name of his confirmation. And this was the case of sir Francis Gawdie, late chiefe-justice of the court of common pleas, whose name of baptism was Thomas, and his name of confirmation Francis; and that name of Francis, by the advice of all the judges, in anno 36 Hen. 8. he did beare, and after used in all his purchases and grants (8). [h] And this doth agree with our ancient books, where it is holden that a man may have divers names at divers times, but not divers Christian names. And the court said, that it may be that a woman was baptized by the name of Anable, and 40 yeares after she was confirmed by the name of Douce, and then her name was changed, and after she was to be named Douce, and that all purchases, &c. made by her by the name of baptism before her confirmation remain good; a matter not much

[A] 22 R. 2.  
briefe 936.  
12 R. 2.  
feoffments 88.  
9 E. 3. 14.  
46 E. 3. 21.  
3 H. 6. 26.  
34 H. 6. 19.  
1 H. 7. 29.  
5 E. 2. briefe 741.  
14 H. 7. 11.

(5) See Cro. Eliz. 27. 222. 328. Cro.  
Jam. 558.  
(6) But not otherwise, post. 264. a.

See 21 E. 4. 15. 16.  
(7) See 1. Leon. 307. Dy. 86.  
(8) Acc. 2. Ro. Abr. 125. A.



much in use, nor requisite to be put in ure, but yet necessary to be knowne. [f] But purchases are good in many cases by a knowne name, or by a certaine description of the person without either surname or name of baptism, as *uxori I. S.* as hath been said, or *primo genito filio*, or *secundo genito filio*, &c. or *filio natu minimo I. S.* or *seniori fuero*, or *omnibus filiis*, or *filiabus I. S.* or *omnibus liberis seu exitibus* of *I. S.* or to the right heires of *I. S.*

37 H. 6. 30.

11 E. 4. 2.

7 H. 4. 5.

40 E. 3. 9. 37 H. 8.

Bro. Nourne 40.

[k] But if a man do infranchise a villein *cum tota sequela sua*, that is not sufficient to infranchise his children borne before, for the uncertainty of the word *sequela*. [l] But regularly in writs, the demandant or tenant is to be named by his Christian name and surname, unless it be in cases of some corporations or bodies politique (9).

[3. b.]

[a] A bastard having gotten a name by reputation may purchase by his reputed or knowne name to him and his heires, although he can have no heir but of his body. A man makes a lease to *B.* for life, remainder to the eldest issue male of *B.* and the heires males of his body. *B.* hath issue a bastard son, he shall not take the remainder, because in law he is not his issue; for *qui ex damnato coitu nascuntur inter liberos non computantur*. And as *Littleton* saith, a bastard is *quasi nullius filius*, and can have no name of reputation as soone as he is borne. [b] So it is if a man make a lease for life to *B.* the remainder to the eldest issue male of *B.* to be begotten of the body of *Jane S.* whether the same issue be legitimate or illegitimate. *B.* hath issue a bastard on the body of *Jane S.* this sonne or issue shall not take the remainder; for (as it hath been said) by the name of issue, if there had beene no other words, he could not take; and (as it hath been also said) a bastard cannot take, but after he hath gained a name by reputation, (1) that he is the sonne of *B.* &c. [c] And therefore he can take no remainder limited before he be born; but after he be borne, and that he hath gained by time a reputation to be knowne by the name of a son, then a remainder limited to him by the name of the son of his reputed father, is good; but if he cannot take the remainder by the name of issue at the time when he is borne, he shall never take it. And so it seemeth, and for the same cause, if after the birth of the issue *B.* had married *Jane S.* so as he became, bastard eigne, and had a possibility to inherit, yet he shall not take the remainder.

Persons deformed having human shape (2), ideots, madmen, lepers, deafe, dumbe, and blinde, minors, and all other reasonable creatures, have power to purchase and retaine lands or tenements.

[d] But the common law doth disable some men to take any estate in some particular things; as if an office either of the grant of the king or subject which concerns the administration, proceeding, or execution of justice, or the king's revenue, or the commonwealth, or the interest, benefit, or safetie of the subject, or the like; if these or any of them be granted to a man that is unexpert, and hath no skill and science to exercise or execute the same, the grant is merely (3)

void,

(9) As to naming of persons in writs and pleadings, see *Thelo. Dig. Br. Orig. lib. 3.* and 6. and the title *Abatement* in *Com. Dig.*

(1) [See N. 14.]

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(2) Who ought to be deemed such, see post. 7. b. 25. b.

(3) See acc. *Godb. 391. Hardr. 130. Scrogg's case*, cited by lord Coke in the margin, is in *Dy. 175.*

[7] 17 E. 3. 29.

18 E. 3. 49.

30 E. 3. 18.

11 H. 4. 84.

Pl. Com. 225.

21 H. 2. devise.

41 E. 3. 19.

15 E. 3.

Counterplea de

vouch. 43.

35. Ass. 13.

[k] 15 H. 7. 14.

[7] 9 E. 3. 437.

29 E. 2. 44.

19 E. 4. 11.

21 E. 4. 19.

7 H. 6. 29.

[a] 39 E. 3. 42.

11. 24.

17 E. 3. 43.

35. Ass. 13.

41 E. 3. 19.

Vide Se et. 118.

[b] So it was re-

solved, M. 38. &amp;

39. Edz. in Bro.

de errore, for land

in Portington in

com. Salop.

(3. C. Cro.

Ediz. 809.

Noy 35.

Mo. 430.

2. Mo. Abr. 43.

44.)

[c] 39 E. 3.

11. 24.

35. Ass. 13.

41 E. 3. 19.

17 E. 3. 42.

(6. Co. 66.)

[d] 5 E. 4. th.  
office and office?  
Bro. 4

Vinter's case,

5 Mar. Dier.

Ro. 150. b. &

Scrogg's case

(Hob. 148.)

Cro. Jam. 17.)

[c] M. 40. & 41. Eliz. in the King's Bench between Scamler and Walters.

(Contra March. 43. S. C. W. Jo. 310. Cro. Car. 279. 556.)

[f] 11. Co. 2. in Auditor Curle's case.

(S & 6 E. 6. c. 15. & post. 234. a.)

Wile Sect. 378. 1 H. 7. 31.

[g] Bract. lib. 4. fo. 421. 418.

Britt. cap. 22. 39. Fleta. lib. 5. cap. 41.

1 E. 3. 9. 44 E. 3. 4. 3 H. 6. 24. 21 E. 2. Judgement 263. 7 H. 4. 2. 14 H. 8. 18. Doct. & Spink 141. Fl. Com. fo. 47. Brit. cap. 33. (Post. 76. a.)

void, and the partie disabled by law, and incapable to take the same, *pro commodo regis et populi*; for onely men of skill, knowledge and ability to exercise the same are capable of the same, to serve the king and his people. [c] An infant or minor is not capable of an office of stewardship of the court of a manor, either in possession or reversion (4). [f] No man, though never so skilful and expert, is capable of a judiciall office in reversion (5), but must expect untill it fall in possession. And see Sect. 378. where bargaining or giving of money, or any manner of reward, &c. for offices there mentioned, shall make such a purchaser incapable thereof; which is worthy to be knowne, but more worthy to be put in due execution.

Some are capable of certain things for some special purpose, but not to use or exercise such things themselves; as the king is capable of an office, not to use but to grant, &c. (6)

A monster borne within lawfull matrimonie, that hath not human shape, cannot purchase, much lesse reteine any thing. [g] The same law is *de professis et mortui saculo*, for they are *civiliter mortui* (7); whereof you shall read at large in his proper place, Sect. 200.

"Purchase," in Latin *perquisitum*, of the verbe *perquirere*. Littleton describeth it in the end of this Chapter in this manner: *Item, purchase est appelle possession de terres ou tenements que home ad per son fait, ou per son agreement, a quel possession il n'avient per tittle de discent de nul de ses ancesters ou de ses cosens, mes per son fait demanc.* So as I take it, a purchase is to be taken, when one cometh to lands by conveyance or title; and that disseins, abatements, intrusions, usurpations, and such like estates gained by wrong, are not said in law purchases (8), but oppressions and injuries.

Note, that purchasers of lands, tenements, leases, and hereditaments for good and valuable consideration, shall avoid all former fraudulent and covinous conveyances, estates, grants, charges, and limitations of uses, of or out of the same, [h] by a statute made since Littleton wrote (9), whereof you may plainly and plentifully read in my Reports, to which I will add this case. *I. C.* had a lease of certaine lands, for 60 yeares, if he lived so long, and forged a lease for 90 years absolutely, and he by indenture reciting the forged lease, for valuable consideration, bargained and sold the forged lease and all his interest in the land to *R. G.* It seemed to me that *R. G.* was no purchaser within the statute of 27 Eliz. for he contracted not for the true and lawfull interest, for that was not knowne to him; for then perhaps he would not have dealt for it, and the visible and knowne tearme was forged; and although by general words the true interest passed, notwithstanding he gave no valuable consideration, nor contracted for it. And of this opinion were all the judges in Serjeants-Inne, in Fleet-street.

[i] In ancient time, when a man made a fraudulent feoffment, it was said, *quodd posuit terram illam in brigam*; where *brigam* doth signifie wrangle, contention, or intricacy, for fraud is the mother of them all. [k] And on the other side, purchases, estates, and contracts

[h] 27 Eliz. cap. 4.

13 Eliz. cap. 8.

S. Co. 80. 83. 43. Twine's case.

S. Co. 60. Gooche's case.

6. Co. 72. Burrell's case.

11. Co. 74. Pasch. 12. Ja.

inter Jones pl. and sir Rich.

Groobham def. in ejectione

firmæ in evidence

al Jurie.

[i] Hll. 18 E. 3. coram rege in Theaur.

[k] 37 H. 8. cap. 6.

(4) [See N. 15.]

(5) [See N. 16.]

(6) [See as to this, Plowd. 381.]

(7) [See N. 17.]

(8) Accord. ante 2. b. and post. 18 b.

(9) For cases of fraudulent gifts before the 13 Eliz. c. 5. see Dy. 294. b. and 295. a.

tracts may be avoided, since *Littleton* wrote, by certain acts of parliament against usurie above ten in the hundred, in such manner and forme as by those acts is provided; which statutes are well expounded in my books of reports, which may be read there.

- [4. a.] To them that lend money my caveat is, that neither directly nor indirectly, by art, or cunning invention, they take above ten (1) in the hundred; for they that seeke by sleight to creepe out of these statutes, will deceive themselves, and repent in the end.

"*Purchase terres.*" *Littleton* here and in many other places putteth lands but for an example; for his rule extendeth to seigniories, rents, advowsons, commons, estovers, and other hereditaments, of what kind or nature soever.

"*Terre,*" *Terra*, Land, in the legall signification, comprehendeth any ground, soile, or earth whatsoever; as meadowes, pastures, woods, moores, waters, marishes, furses, and heath. *Terra est nomen generalissimum, et comprehendit omnes species terra;* but properly, *terra dicitur à terendo, quia vomere teritur;* and anciently it was written with a single *r*; and in that sense it includeth whatsoever may be plowed; and is all one with *arvum ab arando*. It legally includeth also all castles, houses, and other buildings: for castles, houses, &c. consist upon two things, viz. land or ground, as the foundation or structure thereupon; so as passing the land or ground, the structure or building thereupon passeth therewith. \* Land is anciently called *Fleth*; but land builded is more worthy than other land, because it is for the habitation of man, and in that respect hath the precedence to be demanded in the first place in a (2) *precipit*, as hereafter shall be said. And therefore this element of the earth is preferred before the other elements: first and principally, because it is for the habitation and resting-place of man; for man cannot rest in any of the other elements, neither in the water, ayre, or fire. For as the heavens are the habitation of Almighty God, so the earth hath be appointed as the suburbs of heaven to be the habitation of man; *Calum calis domino, terram autem dedit filiis hominum:* All the whole heavens are the Lord's, the earth hath he given to the children of men. Besides, every thing, as it serveth more immediately or more meerly for the food and use of man (as it shall be said hereafter), hath the precedent dignity before any other. And this doth the earth; for out of the earth commeth man's food, and bread that strengthens man's heart, *confirmat cor hominis*, and wine that gladdeth the heart of man, and oyle that makes him a cheerfull countenance; and therefore, *terra olim Opus mater dicta est, quia omnia hac opus habent ad vivendum.* And the divine agreeth herewith; for he saith, *Patriam tibi et nutricem, et matrem, et mensam, et domum posuit terram Deus, sed et as pulchrum tibi hanc eandem dedit.* Also, the waters that yeeld fish for the food and sustenance of man are not by that name demandable in a *precipit* (3); but the land whereupon the water floweth or standeth is demandable; as for example, *viginti acras terre aqua cooperatas:* and besides, the earth doth furnish man with many other necessities for his use, as it is replenished with hidden treasures; namely, with gold, silver, brasse, iron, tynne, leade, and other metals, and also with a great varietie of precious stones, and many other things for profit, ornament,

13 Elix. cap. 8.  
5 Co. 60.  
Burton's case.  
Eodem lib. 7.  
Claiton's case.  
(Lutw. 371.)

(5. Co. 60.)

Lands and other things to be purchased.

Pl. Com. 168. b.  
and 170. a. and  
181. 4. Co. 87. b.  
Lutw. rel's case.  
4 E. 3. 161. and  
6 E. 3. 283.  
8 E. 3. 377.  
Tempe E. 1.  
Brieffe 811.  
28 H. 8.  
Dyer 47.

\* Tr. 7 E. 3.  
coram Rege  
Northampton  
Theaur.

Psal. 115. 16.

Psal. 104. 15.

Christost. homi  
30.

(Flowd. 313.)

(1) [See N. 18.]

(2) Acc. Fitzh. Nat. Br. 2. C. Post. 4. b.

and 4. Co. 39. a.

(3) Acc. Yelv. 143. See post. 4. b.

ment, and pleasure. And lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre and all other things even up to heaven; for *cujus est solum ejus est usque ad celum*, as is holden 14 H. 8. fo. 12. 22 Hen. 6. 59. 10 E. 4. 14. *Registrum origin.* and in other bookes.

And albeit land, whereof our author here speaketh, be the most firme and fixed inheritance, and therefore it is called *solum, quia est solidum*, and fee simple the most highest and absolute estate that a man can have; yet may the same at severall times be moveable, sometime in one person, and *alternis vicibus* in another; nay sometime in one place, and sometime in another. As for example, if there be 80 acres of meadow which have been used time out of mind of man to be divided betweene certain persons, and that a certaine number of acres appertaine to every of these persons; as for example, to A. 13 acres, to be yearly assigned and lotted out, so as sometime the 13 acres lie in one place, and sometime in another, and so of the rest; A. hath a moveable fee simple in 13 acres, and may be parcell of his manor, albeit they have no certaine place, but yearly set out in several places, so as the number only is certaine, and the particular acres or place wherein they lie after the year incertaine. And so it was adjudged in the king's bench upon an especiall verdict (4).

If a partition be made betweene two coparceners of one and the selfe-same land, that the one shall have the land from Easter untill Lammas to her and to her heires, and the other shall have it from Lammas till Easter to her and her heires, or the one shall have it the first yeare, and the other the second yeare, *alternis vicibus, &c.* there it is one selfe-same land wherein two persons have severall inheritances at several times. So it is if two coparceners have two severall manors by descent, and they make partition, that the one shall have the one manor for a year, and the other the other manor for the same yeare, and after that yeare then she that had the one manor shall have the other, *et sic alternis vicibus* for ever; and albeit the manors be severall, yet are they certaine, and therefore stronger than Bridgewater's case; so as this doth make a division of states of inheritances of lands, *viz.* certaine or unmoveable, whereof *Littleton* here speaketh, and incertaine and moveable, whereof these three cases for examples have beene put. Wherein it is to be noted, that the possession is not onely severall, but the inheritance [4. b.] also. It is also necessary to be seene by what names lands shall plasse. [a] If a man hath 20 acres of land, and by deed granteth to another and his heires *vesturam terræ*, and maketh livery of seisin *secundum formam chartæ*, the land itselfe shall not passe (1), because he hath a particular right in the land; for thereby he shall not have the houses, timber-trees, mines, and other reall things parcell of the inheritance, but he shall have the vesture of the land, (that is) the corne, grasse, underwood, swepage, and the like, and he shall have an action *quare clausum fregit*. [b] The same law, if a man grant *herbagium terræ*, he hath a like particular right in the land, and shall have an action *quare clausum fregit*; but by grant thereof and livery made, the soile shall not passe, as is aforesaid. [c] If a man let to B. the herbage of his woods, and after grant

Vid. Sect. 59.  
where in this  
case livery shall  
be made.  
(Post. 48. b.  
7. Co. 5.)

Vide Sect. 648.  
how these 13  
acres may be  
charged.  
(1. Ro. Abr. 529.  
Cro. Eliz. 421.)  
Hill. 34 Eliz.  
Rot. 489. in  
trans. inter  
Weldon &  
Bridgewater in  
Banco Regis.  
Temps. E. 1. tit.  
partition. 21.  
F. N. B. 62. l.  
Vide 1. Co. 87.  
per Walsail.  
F. N. B. 62. K.  
(Post. 167. a.  
7. Co. 5.)

Vide Sect. 114.  
where advow-  
sons, &c. may  
be appendant  
and in groce.  
By what names,  
&c. lands, &c.  
shall passe.  
[a] Vide Sect.  
389.  
(Post. 186. b.  
Coutra 1.  
Ventr. 393.)  
14 H. 8. 6.  
4 Hen. 7. 3.  
10 H. 7. 24.  
11 H. 7. 21.  
14 H. 7. 4. 6.  
21 H. 7. 36, 37.  
9 H. 6. 52.  
17 H. 6. 38.  
22 E. 4. barre  
116.  
11 H. 4. 90.  
18 E. 3.  
Execution 56.  
4 E. 3. 48.  
8 E. 3. 13.  
9 Ass. p. 12.  
38 E. 5. 34.  
Cro. Cha. 322.

[b] Braot. fo. 232.  
Noy. 64.)

17 E. 3. 75.

30 H. 6. 38.

11 Eliz. Dy. 285.

(4. Leon. 43.

Post. 47. a.

[c] Pasch. 12. Ja. inter Deakway & Points in evidence al Jury in Banks & Roy.

grant all his lands in the tenure, possession, or occupation of *B.* the woods shall passe, for *B.* hath a particular possession and occupation, which is sufficient in this case; and so it was resolved. [d] So if a man be seised of a river, and by deed doe grant *acharalem piscarium* in the same, and maketh livery of seisin *secundum formam charte* the soile doth not passe (2), nor the water, for the grantor may take water there; and if the river become drie, he may take the benefit of the soile; for there passed to the grantee but a particular right, and the livery being made *secundum formam charte*, cannot enlarge the grant. [c] For the same reason, if a man grant *aquam suam*, the soile shall not passe, but the piscary [3] within the water passeth therewith. And land covered with water shall be demanded by the name of so many acres *aquâ* (4) *coopertas*; whereby it appeareth that they are distinct things. [f] So if a man grant to another to dig turves in his land, and to carry them at his will and pleasure, the land shall not passe, because but part of the profit is given, for trees, mines, &c. shall not passe. [g] But if a man seised of lands in fee by his deed granteth to another the profit of those lands, to have and to hold to him and his heires, and maketh livery *secundum formam charte*, the whole land itselfe doth passe; for what is the land but the profits thereof: for thereby vesture, herbage, trees, mines, and all whatsoever parcell of that land doth passe (5).

[g] 45 E. 3. tit. *Reoffendentes et fairs* 90. 14 H. 8. 6. Pl. Com. 541. b. F. N. B. 8. 12 E. 3. Dower 90.

[h] By the grant of the boillourie of salt, it is said that the soile shall passe, for it is the whole profit of the soile. And this is called *saliva*, of the French word *salure* for a salt-pit; and you may read *de saliva* in Domesday, and *selda* signifieth the same thing [i]; and where you shall reade in records *de lacertâ in profunditate aquae salsae*, there *lacerta* signifieth a fathom. A man seised of divers acres of wood, grants to another *omnes boscos suos*, all his woods; not onely the woods growing upon the land passe, but the land itselfe, and by the same name shall be recovered in a *fræcipe*; for *boscus* doth not onely include the trees, but the land also whereupon they grow. [k] The same law if a man in that case grant *omnes boscos suos crescentes*, &c. yet the land itselfe shall passe, as it hath beene (6) adjudged. \* *Frassctum* signifieth a wood, or ground that is woodie. [l] If a man hath a wood of elder-trees containing 20 acres, and granteth to another 20 *acras alneti* (with an *n* not a *v*), the wood of elders and the soile thereof shall passe, but no other kinde of woods shall passe by that name. *Alnetum est ubi alni arbores crescant*†. And *sullings* are taken for elders. [m] *Salicetum* doth signifie a wood of willowes, *ubi salices crescant*. These trees in our bookes are called *sawces*. \* *Selda* is a wood of shallows, willowes, or withies. A brackie ground is called *filicetum, ubi filices crescant*. A wood of ashes is called *fraxinetum, ubi fraxini crescant*, and passeth by

[d] Vide Sect.

270. Braet.

fo. 208.

40 E. 3. 48.

Pl. Com. 164.

10 H. 7. 24. 28.

7 H. 7. 13.

18 H. 6. 39.

34 H. 6. 43.

30 H. 6. 4.

18 E. 4. 4.

4 E. 3. 48.

1 E. 3. 4.

38 E. 3. Scher.

fac. 100.

23 E. 4. barre

116. 12 H. 3.

Am. 487.

34 Am. 11.

13 E. 3.

tit. entrie 57.

20 E. 3.

Briefe 688.

W. 2. c. 24.

(3 R. Abr. 2.)

[c] Tr. 11. H. 2. in

trapp. nient Imprim-

me ne abridg.

11 H. 7. 4.

[f] 7 E. 3. 342.

5 Ass. 9, 10.

7 Ass. 9.

(2) [See N. 20.]

(3) Acc. Dav. 55. b.

(4) See acc. Yelv. 143.

(5) Adj. acc. in the case of a *deyise*.

Cro. Eliz. 190.

(6) To know when wood will include the soil, and when not, see Bro. Grants, 167. Cro. Ja. 487. 524. 2 Ro. Abr. 455. U. Pl. 1. 3.

\* Inter-Inquisit. apud Lane. in com. Cornubie coram Justis. Aud. anno 6 E. 1. in Thesaur. the B. of Excester's case.

by that name; and *lupulicetum*, where hopped grow; and *arundinetum* where reeds grow. Some say that *dene* or *denne*, whereof *dena* commeth, is properly a valley or dale. *Dena ellva*, and the like, [n] as *drofden*, or *drufden*, or *druden*, signifieth a thicket of wood in a valley; for *druf*, or *dru*, signifieth a thicket of wood, and is often mentioned in Domesday. And sometime *dena* or *denna* signifieth, as *villa* and *denne*, a towne.

[a] Domesday.

[e] Camden

460. 181.

[p] Pasch.

44 E. 3. coram  
Rege in Thes.

[o] *Cope* signifieth a hill, and so doth *lawe*; as *stanlawe* is *saxens collis*. [p] *Howe* also signifieth a hill. And *hope*, *combe*, and *stow* are valleys, and so doth *clough*. And *dunum* or *duna* signifieth a hill or higher ground, and therefore commonly the townes that end in *dun*, have hills or higher grounds in them, which we call downs. It commeth of the old French word *dun*.

[q] Hill. 13 E. 2.

Lanc. coram

Rege in Thesaur.

Camden. Brit.

247. Rot. Par.

18 E. 1. 8.

Evesque de Car-

isle's case.

[r] Pl. Com.

160. a. 4 E. 2.

Brick. 792, 793.

3 E. 3. 80.

4 E. 4. 1.

27 H. 8. 12.

[s] 20. Ass.

pl. 9.

[q] In our Latin a wood is called *boscus*. *Grava* signifieth a little wood, in old deeds, and *hirst* or *hurst* a wood; and so doth *holt* and *shawe*. *Twaite* signifieth a wood grubbed up, and turned to arable. *Stethe* or *stede* betokeneth properly a banke of a river, and many times a place, as *stowe* doth; and *twic*, a place upon the sea-shore, or upon a river. *Lea* or *ley* signifieth pasture.

[r] If a man doth grant all his pastures, *pasturas*, the land itself employed to the feeding of beasts doth passe, and also such pastures or feedings as he hath in another's man soile. *Leewes* or *leues* is a Saxon word, and signifieth pastures. [s] Between *pastura* and *pascuum*, the legall difference is, that *pastura* in one signification containeth the ground itselfe called pasture, and by that name is to be demanded. *Pascuum*, feeding, is wheresoever cattell are fed, of what nature soever the ground is, and cannot be demanded in a *præcipe* by that name.

[t] Pl. Com.

160. a. 13 E. 3.

Brick. 241.

33 E. 3.

Eutric. 80.

[u] Domesday.

F. N. B. 2.

Regist.

[t] If a man grant *omnia prærata sua*, all his meadowes, the land itselke of that kinde passeth: *et dicitur præratum quasi præratum*, because it groweth *sponte* without manurance. [u] A man grants *omnes brucas suas*; the soile where heath doth growe passeth, and may be demanded by that name in a *præcipe*. It is derived from *bruyer*, a French word for heath; and it is [5. a.] called *ros* in the British tongue.

[a] Regist.

1 E. 3. 4.

F. N. B. 2.

[b] 16. Ass.

p. 9. Register.

*Roncaria* or *runcaria* signifieth land full of brambles and briers, and is derived of *roncier*, the French word which signifieth the same, and as much as *senticetum*. [a] By the grant of *omnes juncarias* or *joncarias*, the soile where rushes do growe doth passe; for *jonc* in French is a rush, whereof *joncaria* commeth. [b] A man grants *omnes ruscarias suas*, the soile where *rusci*, i. e. kneholme, or butchers pricks, or broome doe grow, shall passe, and so in the verse in the Register it is called: but in F. N. B. fol. 2. in the verse *pischaria* is put instead of *ruscaria*. And *jampna* commeth of *jonc* and *novor*, a waterish place, and is all one in effect with *joncaria*. He that granteth *omnes mariscos suos*, all his fennes or marish grounds doe passe. *Mariscus* is derived of the French word *mares* or *marais*; the Latin word for it is *palus*, or *locus paludosus*. *Mora* is derived of the English word moore, and signifieth a more barren and unprofitable ground than marshes, dangerous for any cattell to go there, in respect of myric and moorish soyle, neither serves it for getting of turves there. [c] You shall reade in records, that such a man *perquisivit trescent. acr. maretti, &c.* This word *marctum* is derived of *mare* the sea, and *tego*, and properly signifieth a moorish and gravelly ground, which the sea doth cover and overflow at a full sea,

Jampna,

(Cro. Cha. 179.)

[r] Pasch.

41 E. 3. coram

reg. Lincoln.

Rgt. 28.

sea, and lyeth betwene the high water marke and low water marke, *infra fluxum et refluxum maris*. By grant of these particular kinds, the lands of these particular kinds onely doe passe; but, as hath been said, by the grant of land in generall, all these particular kinds, and some others doe passe. *Non mihi si centum linguæ sint oraque centum, Omnia terrarum percurrere nomina possem*. And therefore let us turn our eye to general words, which doe include lands of several sorts and qualities. [d] By the name of an honor (1), which a subject may have, divers manors and lands may passe. So by the name of an isle, *insula*, many manors, lands, and tenements may passe.

kingdom. Mich. 9 E. 1. coram rege in Thet. 18 E. 2. Ass. 377. 26. Ass. p. 60. 6 E. 3. honor de Feversh. 40 E. 3. 394. honor de Egles. 9 H. 6. 27. 36 H. 8. Dyer 58. honor de Glouc. Abbat. de Merle. 5 E. 4. 130. 7 H. 6. 39. 1 E. 3. 4. &c. 13 E. 3. jurisdiet. 23. 4 Co. 88. Luttrell's case. 5 H. 7. 9. 14 E. 4. in recordo longo. 8 H. 4. Pl. Com. 168. 8 H. 7. 1. 4 E. 4. 16. (4. Inst. 204.)

*Holme* or *hulmus* signifieth an isle or fenny ground. \*A commote is a great seigniorie, and may include one or divers mannors. [c] By the name of a castle, one or more manors may be conveyed: *et è converso*, by the name of a mannor, &c. a castle may passe (2). In Domesday I read, *Comes Alanus habet in suo castellatu 200 maneria, &c. frater castellarium habet 43 maneria*; and in that book a castle is called *castellum*, and *castrum*, and *domus defensibleis*, and *mansus muralis*. [f] But note by the way, that no subject can build a castle or house of strength imbattled, &c. or other fortresse defensible called in law by the names aforesaid, and sometimes *domus kernellata* or *cornellata*, *imbattellata*, *tenellata*, *machecollata*, *mese carnelet*, &c. without the licence of the king, for the danger which might ensue, if every man at his pleasure might do it. And they be called imbattlements, because they are defences against battels in assaults. *Tenellare*, or *tanellare*, is to make holes or loops in walls, to shoote out against the assailants. *Machecollare*, or *machecoulare*, is to make a warlike device over a gate or other passage like to a grate, through which scalding water, or ponderous or offensive things may be cast upon the assaylants (3). But to returne to the matter from whence upon this occasion we are fallen.

By the name of a towne, *villa*, a mannor, may passe. In Domesday, *alodium* (in a large sense) signifieth a free mannor (4), and *alodiarum*, or *alodarii*, lords of the same; and *lannemanni* there signifie lords of a mannor, having *socam et sacam de tenentibus et hominibus suis*. [g] And by the name of a mannor, divers townes may passe. *Quod olim dicebatur fundus nunc munerium dicitur*. By the name of a ferme or fearme (5), *firma*, houses, lands, and tenements may passe; and *firma* is derived of the Saxon word *feormian*, to feed or releve; for in ancient time, they reserved upon their leases, cattell and other victuall and provision for their sustenance. [h] Note, a fearme in the north parts is called a tacke, in Lancashire a fermeholt, in Essex a wike. But the word fearme is the general word, and anciently *fundus* signified a fearme, and sometime

[d] Mag. Chart. c. 31. Wallingford Nott. Bolen. Lane. &c. Trin. 33 E. 1. coram rege in Thet. honor de Hun-

50. 47 E. 3. 21. F. N. B. 265. honor

\* 13 E. 3. jurisdiet. 23.

[c] 26. Am. 54. 29 E. 3. 15. 29 H. 6. Bract. fo. 434. 1 E. 3. 4. 5 H. 7. 9. 3 E. 3. Avowry 188. 37 H. 6. 26. 18 H. 6. 11. Lib. rub. scac. fo. 18.

[f] in veter. Mag. Cart. cap. Escheatree, fo. 162. Britton cap. 20. Rot. Parliam. 45 E. 3. nu. 34. 6 H. 4. nu. 19. 1 E. 4. cap. 1. Rot. Parliam. 1 E. 3. 2. pars. Alano Charletoft 22 E. 3. 2. pars Thoma Barkley, &c. (G. Inst. 201.)

[g] Lamb. exposit. verb. Firmæ. Pl. Com. 193.

[h] Pl. Com. 160. Regist. 227. b. Eject. Firmæ.

(1) for the nature of a landhonor or barony, see Mad. Bar. Angl. 2.

(2) Acc 2. Inst. 31.

(3) See further as to castles, Mad. Baron.

Anglican. 17. to 20. Discours. by Elin Ant. ed. 1773. v. 1. p. 100. 186. and 191.

(4) See ante, 1. b.

(5) See 2. Inst. 144.

[i] 17 E. 3.  
 80. 8.  
 5 E. 3. 213.  
 16 E. 3. bre. 168.  
 15 E. 3. bre. 914.  
 [k] 4 E. 3. 161.  
 6 E. 3. 283.  
 3 E. 3. 8.  
 35 H. 6. 29.  
 Pl. Com. 168.  
 7 Ass. 18.  
 11 Ass. 13.  
 Lamb. Expos.  
 verb. Hyda et  
 Virgat terre.  
 Glanvil. lib. cap.  
 Domesday.  
 Bract. lib. 2.  
 cap. 26; 37, &  
 lib. 5. fo. 434.  
 Regiat. 72.  
 [l] 5 E. 3.  
 fine 49. 13 E. 3.  
 fine 67.  
 39 H. 6. 8.  
 4 E. 3. 189.  
 8 E. 3. 377.  
 Bracton fo. 180.  
 269. 431. 5 H. 3.

time land. [i] Lands making a knight's fee (6), shall passe by the grant of a knight's fee *de uno feodo militis*.

[k] *Unum solinum* or *solinus terre* in Domesday booke containeth two plow-lands and somewhat less than an halfe; for there it is said, *septem solini*, or *solina terre sunt 17 carucat'* (7.) *Una hida seu carucata terre*, which is all one as a plow-land, viz. as much as a plow can (8) till. *Sullerye* also signifieth a plow-land. *Una virgata terre*, a yard-land (the Saxons called it *girdland*, and now the *g* is turned to a *y*), is in some countries 10, in some 20, in some 24, in some 30, &c. (9). [l] *Una bovata terre*, an oxgange, or an oxgate of land, is as much as an ox can till (10). [m] But *carucata terre* and *bovata terre* are words compound, and may containe meadow, pasture, and wood necessary for such tillage. *Jugum terre* in Domesday containeth halfe a plow-land. And by all these names, in the raigne of R. 1. lands were usually demanded, and long after (11).

Droit. 66. Pl. Com. 168. [m] 13 E. 3. bre. 241. 2 E. 3. 57. temps E. 1. bre. 611. Pl. Com. 164.

[n] Pl. Com.  
 169. Linwood.  
 44 E. 3. 21.  
 4 E. 3. 32.

[n] By the name of a grange, *grangia*, a house or edifice, not onely where corn is stored up like as in barnes, but necessary places for husbandry also, as stables for hay and horses, and stables and styes for other cattell, and a *curtillege*, and the close wherein it standeth, shall passe; and it is a French word, and signifieth the same as we take it (12).

[o] 4 E. 3. tit.  
 Frofincatus et  
 Faits 79.  
 14 H. 3.  
 Formedon 34.  
 34. Ass. pl. 11.  
 [u] 13 E. 3. 4.  
 4 E. 3. 143.  
 8 E. 3. 361.  
 10 E. 3. 482.  
 13 E. 3. entry 57.  
 F. N. B. 191. h.  
 Domesday.  
 [b] Temps E. 1.  
 bre. 861.  
 4 E. 3. 5.  
 10 H. 7. 30.  
 44 E. 3. 12.  
 43 E. 3. 24.  
 35 H. 6. 35.  
 3 H. 6. 2.  
 Domesday.  
 Bracton lib. 4. fo. 235. Lit. adjudicat. coram rege p. 39 E. 3. lib. 3. fo. 95. in Thesaur. (4. Inst. 289.)

[o] *Stagnum*, in English a poole, doth consist of water and land; and therefore by the name of *stagnum* or a poole, the water [5. b.] and land shall passe also. [u] In the same manner *gorges*, a deepe pit of water, a gors or gulfe, consisteth of water and land; and therefore by the grant thereof by that name the soile doth passe, and a *prairie* doth lie thereof, and shall lay his esplees in taking of fishes, as breames and roches. In Domesday it is called *guort*, *gort*, and *gors* plurally; as for example, *de 3 gors mille anguilla*.

[b] So it is of a forest, parke, chase, vivarye, and warren in a man's owne ground, by the grant of any of them not onely the privilege, but the land itselfe passes, for they are compound. In the booke of Domesday, that is called *lewad*, and *leuga*, and *lewed*, and *lewe*, which in Latin is called *leuca*.

### Stadium

(6) As to the contents of a knight's fee, see post. 69.

(7) Some think, that *solinus terre* was frequently synonymous with *carucata terre*. See Somn. Rom. Ports 82. Cow. Interpr. ed. 1727, voc. *solinus terre*.

(8) See further as to this, post. 69. and 86. b.

(9) See post. 69.

(10) See post. 69.

(11) See further on the dimensions of land

in England, post. 200. b. and 69. Crompt. on Courts, 222. and Disc. by Emin. Antiq. ed. 1773, v. 1. p. 39. to 50. and 107. 195. and 197. —By what names, and in what order, lands, &c. ought to be demanded, see post. 5. b. Fitzh. N. Br. 2. C. Hugh. Comment. on Orig. Writs 2. and Theloa's Dig. Br. Orig. 1. 8. c. 1. p. 118. and particularly the latter book.

(12) *Grange* sometimes comprehends a whole farm. See 4 Co. 48. b.



[c] *Stadium*, or *ferlingus* sive *ferlingum*, or *quarentena terra*, is a furlong of land, and is as much as to say, a furrow long, which in ancient time was the eighth part of a mile; and land will passe by that name. And some hold that by that name land may be demanded. And *de ferlingis et quarantenis*, you shall read divers times in the book of Domesday; and there you shall read, *in insulâ rex habet unum frustum terre unde exeunt sex vomeres. Nota, frustum significeth a parcell.* [d] *Warectum*, or *wareccum*, or *varectum*, doth signifie fallow; *terra jacet ad warectum*, the land lyeth fallow: but in truth the word is *vervactum*, *quasia verè novo victum seu subactum, terra novatis seu requieta, quia alternis annis requiescat* [e], *tam culta novalia.* [f] By the grant of a messuage, or house, *menagium*, the orchard, garden, and curtilage doe (1) passe; and so an acre or more may passe by the name of a house; it is derived of the French word *mese*. [g] in Domesday, a house in a city or burrough is called *haga*; other houses are called there *mansiones*, *mansure*, and *domus*, [h]; and in an ancient plea concerning Feversham in Kent, *hawes* are interpreted to signifie *mansiones*. In Normans French it is called *menul*, or *mesuil*. *Bye* significeth a dwelling, *bye*, an habitation, and *byan*, to dwell.

Statut. de extent maneri. Domesday.

It is to be noted, that in Domesday there be often named *bordarii* seu *borduanni*, *cosces*, *coscet*, *cotucami*, *cotarii*, who are all in effect bores or husbandmen, or cottagers, saving that *bordarii*, which cometh of the French word *borde* for a cottage, significeth there bores holding a little house, with some land of husbandry bigger than a cottage; and *coterelli* are meere cottages, *qui cotagia et curtilagia tenent* (2).

*Villani* in Domesday (often named) are not taken there for bondmen, but had their name *de villis*, because they had fermes, and there did worke of husbandry for the lord: and they were ever named before *bordarii*, &c. and such as are bondmen are called there *servi*.

[f] *Coleberti*, often also named in Domesday, significeth tenants in free socage by free rent; and so it is expounded of record. *Radmans* and *radchemistres* (*rad*, or *rede*, significeth firme and stable,) there also often named; these are *liberi tenentes qui arabant et herciebant ad curiam domini, seu falcabant, aut metebant*, because their estates are firme and stable; and they are many times called *sochemans* and *sockemanni*, because of their plough service.

*Dreuchs* significeth free tenants of a mannor, there also named. *Taini*, or *thaini mediocres*, were freeholders, and sometime called *milites regis*, and their land called *tainland*; and there it is said, *hec terra T. R. E. fuit tainland, sed postea conversa in reveland.* [k] But *thainus regis* is taken for a baron; for it is said in an ancient author, *thainus regis proximus comiti est, et ibidem mediocris thainus, et alibi baro sive thainus* (3). *Berquarium*, or *bercaria*, cometh of *berc*, an old Saxon word, used at this day for barks or rindes of trees, and

[c] 40. Ass. 32.  
4 H. 6. 14.  
35 E. 1. ca. 6.  
Anno 10 R. L.  
inter fin. in  
Thes. Ferlingum  
terre continet  
32 acras.  
Domesday.  
Frustum. 16 E. 3.  
tit. Comon. 9.  
[d] Mich. 8 H. 3.  
incipien. 9.  
coram rege  
Warr. Ro. 6.

[e] Virg.  
Eclor. 1. 2.  
[f] Bract. 21.  
333. 22 E. 4.  
trans. 140.  
Pl. Com. 168.  
171. 23 H. 8.  
Br. Froffmans  
53. 9. Ass. p. 28.  
35 M. 6. 44.  
Pl. Com. 169.  
(1. Sid. 309.)  
[g] Domesday.  
[h] Pasch. 30 E. 2.  
coram rege Kane.  
in Thesaur.

Domesday.

[f] Int. placit.  
coram domino  
rege Mich.  
10 E. 3.  
Rot. 26.  
Lamb. exposit.  
verb. Thangy

[k] Lib. Rub.  
cap. 15. and cap.  
41. & 76. W. 2.  
c. 46. 7 H. 4. 23.  
Lib. d'Entrus,  
tit. Ass.  
Corps Pol. 2.  
(4. Inst. 294.)  
Domesday.

(1) [See. N. 21.]

(2) See as to cottages, 2 Inst. 736.

(3) See further as to *thape* and *thane*.

and signifieth a tan-house, or a heath-house, where barks or rindes of trees are laid to tan withal: and *berquarii* are mentioned in Domesday. It signifieth also, and more legally, a sheep-cote, of the French word *bergerie*.

[l] By *vaccaria* in law is signified a dairy-house, derived of *vacca*, the cow. In Latin, it is *lactarium*, or *lactitium*; and *vaccarius* is mentioned in Domesday. And Fleta maketh mention of *porcaria*, a swinestye.

The content of an acre is known. The name is common to the English, German, and French. In legal Latin it is called *acra* which the Latinists call *jugerum*. In Domesday it is called *arpen prati, silva*, &c. 10 R. 1. *inter fines*. *Acra* in Cornwall *continet 40 perticatat in longitudine, et 4 in latitudine, et quolibet perticata de 16 pedibus in longitudine* (4).

[m] By the grant of a selion of land, *selio terra*, a ridge of land which containeth no certainty, for some be greater, and some be lesser; and by the grant *de una porca*, a ridge doth passe. *Selio* is derived of the French word *selion*, for a ridge.

[n] By the grant *de centum libratia terra*, or *50 libratia terra*, or *centum solidatis terra*, &c. land of that value passeth, and so of more or lesse; and in ancient time by that name it might have been demanded. [o] And many things may passe by a name, that by the same name cannot be demanded by a (5) *fræcipe*, for that doth require more prescript forme; but whatsoever may be demanded by a *fræcipe*, may passe by the same name by way of grant.

*Frythe* is a plaine betweene woods; and so is *lawnd* or *lound*. *Combe, hope, dene, glyn, hawgh, howgh*, signifyeth a vally. *Howe, hoo, knoi, law, pen*, and *cope*, a hill. *Ey, ing*, and *worth*, signifieth a watry place or water. *Falesia* is a bank or hill by the sea-side; it commeth of *falaize*, which signifieth the same. Of all these you shall read in ancient bookes, charters, deeds, and records: [6. a.] and to the end that our student should not be discouraged for want of knowledge, when he meeteth with them (*nescit enim generosa mens ignorantiam pati*), we have armed him with the signification of them, to the end he may proceed in his reading with alacrity, and set upon, and know how to worke into with delight these rough mines of hidden treasure.

[m] By the name of *minera*, or *fodina plumbi*, &c. the land itselfe shall passe in a grant, if livery be made, and also be recovered in an assise, *et sic de similibus*.

By the grant of a fouldcourse, or the like, lands and tenements may (1) passe [n]. *Tenementum*, tenement, is a large word to passe not only lands and other inheritances which are holden, but also offices, rents, commons, profits appender out of lands, and the like, wherein a man hath any frank tenement, and whereof he is seised *ut de libero tenemento* (2). But *hereditamentum*, hereditament, is the largest word of all in that kind; for whatsoever may be inherited is an

[l] 7 H. 4. 23.  
Fleta lib. 2.  
cap. 35. Domesday.  
10 R. 1.  
inter fines.

[m] 9 E. 3. 30.  
1 Crisp. E. 1.  
Br. 866. Mich.  
30 E. 1. coram  
rege Glouc. in  
Thesaur.  
[n] Bract. fo.  
377. 431.  
43 E. 3. 37.  
Regist. fo. 1.  
94. 248, 249.  
F. N. B. fo. 87.  
F. 1.  
[o] Regula.  
7 R. 1. inter  
fines Sussex.

[m] 17 R. 3. 7.  
43 F. 3. 35. b.  
Regist. 65.  
10 H. 7. 21. Pl.  
Com. 191. 195.  
Bract. 211. 236.

[n] 45 E. 3.  
Vouches 72.  
33 E. 3.  
grant. 102.  
11 H. 6. 23. 19.  
14 E. 4. 4.  
80. Ass. p. 9.  
3 E. 4. 10.  
14 H. 7. 25.  
(Post. 10. b. 20.  
add 144.)

(4) [See N. 22.]  
(5) See ante 5. a. n. 11.  
(1) [See N. 23.]

(2) See further as to the extent of the word *tenement*, Perk. sect. 114. and 11 H. 6. 22.

an hereditament, be it corporeall or incorporeall, reall or personall, or mixt (3).

[o] A man seised of land in fee has divers charters, deeds, and evidences, and maketh a feoffment in fee, either without warrantie, or with warrantie only against him and his heirs, the purchaser shall have all the charters, deeds, and evidences, as incident to the lands, *et ratione terre*, to the end he may the better defend the land himself, having no warrantie to recover in value; for the evidences are, as it were, the sinewes of the land, and the feoffor not being bound to warrantie hath no use of them. But if the feoffor be bound to warrantie, so that he is bound to render in value, then is the defence of the title at his peril; and therefore the feoffee in that case, shall have no deeds that comprehend, warrantie, whereof the feoffor may take advantage. Also, he shall have such charter, as may serve him to deraigne the warrantie paramount. Also, he shall have all deeds and evidences, which are materiall for the maintenance of the title of the land: but other evidences which concerne the possession, and not the title of the land, the feoffee shall have them, (4).

"*A aver et tener.*" These two words do in this place prove a double signification, *viz.* *a aver*, to have an estate of inheritance of lands descendible to his heirs, and *tener*, to hold the same of some superior lord.

There have beene eight formall or orderly parts of a deed of feoffment (5), *viz.* 1. the *premises* of the deed implied by *Littleton*; 2. the *habendum*, whereof *Littleton* here speaketh; 3. the *tenendum*, mentioned by *Littleton*; 4. the *reddendum*; 5. the *clause of warrantie*; 6. the *in cujus rei testimonium*, comprehending the sealing; 7. the date of the deed, containing the day, the month, the yeare and stile of the king, or of the yeare of our Lord; [h] lastly, the clause of *hinc testibus*; and yet all these parts were contained in very few and significant words [g], *hæc fuit candida illius ætatis fides et simplicitas, quæ pauculis lineis omnia fidei firmamenta posuerunt.*

may's case. Vid. Sect. 372. (2. Ro. Abr. 23.)

The office of the *premises* of the deed is two fold; first, rightly to name the feoffor and the feoffee; and secondly, to comprehend the certainty of the lands or tenements to be conveyed by the feoffment, either by expresse words, or which may by reference be reduced to a certaintie; for *certum est quod certum reddi potest*. The *habendum* hath also two parts, *viz.* first, to name againe the feoffee; and secondly, to limit the certaintie of the estate. The *tenendum* at this day, where the fee simple passeth, must be of the chiefe lords of the fee. And of the *reddendum* more shall be said in his proper place, in the Chapter of Rents. Of the *clause of warrantie* more shall be said in the Chapter of Warranties. *In cujus rei testimonium sigillum meum appositum* was added, for the seale is of the essentiall part of the deed. The date of the deed many times antiquity omitted; and

[o] 1. Co. fo. 1.  
8. 2. in S. Guior  
Buckhurst's  
case.  
44 E. 3. 11. b.  
30 E. 3. 17. a.  
19 H. 6. 65. b.  
34 H. 6. 1. a.  
10 F. 4. 9. b.  
18 E. 4. 14. 15.  
6 H. 7. 3. b.  
H. 7. 33. a.  
(2. Ro. Abr. 31.)

Vide Sect. 46.  
& 370, 371.  
many things de  
cartis et feodis.  
Fleta lib. 3. ca.  
14. Britton 100.  
101. Bract.  
lib. 4. fo. 396. a.  
399.  
38 H. 6. 33. 36.  
Pl. Com.  
Wrottesley's  
case, fol. 96.  
[p] Vid. Throp-  
morton's case, Pl.  
Com.  
[q] 6. Co. 43. in  
sir Anthony Mild-

Brit. fo. 101.

(3) [See N. 24.]

(4) [See N. 25.]

(5) See the observations on this part of the Commentary in Mad. Form. Angl. Dissert. p. 5: See also on the subjects of

ancient deeds and charters, the whole of the same Dissertation and Nich. Engl. Hist. Libr. 2d ed. 240. Seld. Jan. Angl. b. 2. c. 2. and 3. to which may be added Mabil-  
lon de Re Diplomatica.

the reason thereof was, for that the limitation of prescription, or time of memory, did often in processe of time change; and the law was then holden, that a deed bearing date before the limited time of prescription, was not pleadable; and therefore they made their deedes without date, to the end they might alledge them within the time of prescription. And the date of the deedes was commonly added in the raigne of E. 2. and E. 3. and so ever since.

And sometime antiquitie added a place, as *datum apud D.* which was in disadvantage of the feoffee; for being in generall he may alleage the deed to be made where he will. And lastly, antiquitie did add *hinc testibus* in the continent of the deed after the *in cuius rei testimonium*, written with the same hand that the deed was, which witnesses were called, the deed read, and then their names entered. [r] And this is called charter land; and accordingly the Saxons called it *bockland*, as it were booke land (6); which clause of *hinc testibus* in subjects deeds continued untill and in the raigne of H. 8. but now is wholly omitted. And it appeareth by the ancient authors and authorities of the law, that before the statute of 12 E. 2. c. 2. processe should be awarded against the witnesses named in the deed, *testes in carta nominatos*; [s] and that the same statute was but an affirmance of the common law, which not being well understood, hath caused varietie of opinions in our books. But the delay therein was so great, and sometimes (though rarely) by exceptions against those witnesses, which being found true, they were not to be sworne at all, neither to be joined to the jury, nor as witnesses; [t] as if the witness were infamous: for example, if he be attainted of a false verdict, or of a conspiracie at the suite of the king, or [6. b.] convicted of perjury, or of a præmunire, or of forgerie upon the statute of 5 Eliz. cap. 14. and not upon the statute of 1 Hen. 5. cap. 3. or convict of felony, or by judgement lost his *res*, or stood upon the pillory or tumbrell, or beene *stigmaticus*, branded, or the like, (1), whereby they become infamous for some offences, *que sunt minoris culpe sunt majoris infamie*.

[r] Lamb. exposit. verb. terra ex scripto. Vid. Fortescue, cap. 32. See the Second Part of the Instit. cap. 38. 12 E. 2. c. 2. See the Second Part of the Institutes. Marib. cap. 6. and cap. 14. [s] Brit. fo. 65. 101. 11 E. 3. process 170. C. H. 3. process 209. 8 H. 3. process 210. 4 E. 2. gard 119. [t] Mirror ca. 4. met. de infames et perjuris. Glanv. lib. 2. cap. 14. Bract. lib. 5. fo. 288. 292. Brit. fo. 134. 135. 101. Fleta lib. 1. ca. 21. 8 E. 2. Ass. 396. 3 E. 3. 22. 24 E. 3. 34. (5 Co. 99. Flower's case.) 43 E. 3. conspir. 11. 27. Ass. 59. 33 H. 6. 55. 21 H. 6. 36. (4. Inst. 279. 1. Sid. 51. Godb. 288. 2. Bulst. 154. Raym. 369. 1. Ventri. 349. 1. Kelynge 38. 18. 4. Inst. 279. T. Jo. 155. 2. Ro. Abr. 686.)

[a] Fortescue. ca. 25. Pat. 55 H. 3. m. 3. Stan. Pl. Cor. 174. 2.

[b] Fortescue. ca. 26.

[c] 22 Ass. 12. and 41. 23. Ass. 11. 19 E. 2. tit. Ass. 409.

[a] If a champion in a writ of right become recreant or coward, he thereby loseth *liberam legem*, and thereby becomes infamous, and cannot be a witsnesse; for regularly he that loseth *liberam legem*, becometh infamous, and can be no witsnesse. Or if the witsnesse be an infidell (2), or of non-sane memory, or not of discretion, or a partie interested, or the like. [b] But oftentimes a man may be challenged to be of a jury, that cannot be challenged to be a witsnesse; and therefore though the witsnesse be of the neerest alliance, or kindred, or of counsell, or tenant, or servant to either partie, or any other exception that maketh him not infamous, or to want understanding, or discretion, or a partie in interest, though it be proved true, shall not exclude the witsnesse to be sworne [c], but he shall be sworne, and his credit upon the exceptions taken against him left to those of the jury, who are tryers of the fact; inso-much as some bookes have said, that though the witsnesse named

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(6) [See N. 26.]  
(1) [See N. 27.]

(2) [See N. 28.]

in the deed be named a disseisor in the writ, yet he shall be sworne as a witness to the deed. [d] A witness amongst others named in a deed was outlawed, and no process was awarded against him by the statute, because he was *extra legem*; and an outlawed person cannot be an auditor. And the court in some bookes have said, that they have not scene witnesses challenged, which is regularly to be understood with the limitations abovesaid; but such as are returned to be of a jury are to be challenged for the causes aforesaid for outlawry, and divers other causes (for the which a witness cannot be challenged), and such process against witnesses (3) is vanished. But seeing the witnesses named in a deed shall be joyned to the inquest, and shall in some sort joyne also in the verdict (in which case if jury and witnesses finde the deed that is denied to be the deede of the partie, the adverse partie is debarred of his attain, because there is no more than 12 that affirme the verdict) (4), it is reason, that in that case of joyning such exception shall be taken against the witness as against one of the jury, because he is in the nature of a juror. [e] And therefore to put one example, if he be outlawed in a personall action, he cannot be joyned to the jury; but yet that is no exception against him to exclude him to be sworne as a witness to the jury. And the reason of all this is, for that if he with others should joyne in verdict with the jury in affirmance of the deed, the partie should be barred of his attain. But note, there must be more than one witness that shall be joyned to the inquest. And albeit they joyne with the jury, and finde it not his deed, notwithstanding this joyning, the partie shall have his attain; for it is a maxim in law [f] that witnesses cannot testifie a negative (5), but an affirmative. And if one of the witnesses named in the deed be one of the panell, he shall be put out of the panell: and all these secrets of law notably appeare in our bookes.

To shut up this point, it is to be knowne, [g] that when a trial is by witnesses, regularly the affirmative ought to be proved by two or three witnesses, as to prove a summons of the tenant, or the challenge of a juror and the like. But when the trial is by verdict of 12 men, there the judgment is not given upon witnesses, or other kinde of evidence, but upon the verdict; and upon such evidence as is given to the jury, they give their verdict. And Bracton saith, there is *probatio duplex*, viz. *viva*, as by witnesses *viva voce*; and *mortua*, as by deedes, writings, and instruments. And many times juries, together with other matter, are much induced by presumptions; whereof there be three sorts, viz. violent, probable, and light or temerary. *Violenta presumptio* is manie times *plena probatio*; as if one be runne thorow the bodie with a sword in a house, whereof he instantly dieth, and a man is scene to come out of that house with a bloody sword, and no other man was at that time in the house. *Presumptio probabilis* moveth little; but *presumptio levis seu temeraria* moveth not at all. So it is in the case of a charter of feoffment,

[d] 34 E. 1.  
process 208.

[e] 34 E. 1.  
tit. Process. 208.  
11 Ass. p. 19.  
20. 12. Ass.  
p. 1. 12. 41.  
18. Ass. p. 11.  
23. Ass. 15.  
23. Ass. 15.  
40. Ass. 23.  
48. Ass. p. 4.  
31 H. 6. 30.  
[f] 48 E. 2.  
30. 12 H. 6.  
fo. 6. a.  
50 F. 3. 16.  
43 E. 3. 32.  
12 H. 4. 9.  
10 E. 2.  
Ass. 408. Proch.  
14 E. 3. coron.  
rege Devon.  
in Thesaur.  
Fleta lib. 6.  
cap. 6. F. N. B.  
100. h. and  
97. c.  
(Post. 303.)  
[g] Mirror ca.  
3. Pl. Com.  
fo. 10.  
Bract. lib. 5.  
fo. 400.  
(Post. 373. a.)

Fleta lib. 6.  
ca. 33.  
8 E. 3. 200.  
30 E. 3. 21. b.

(3) See further on this subject of joining with the jury the witnesses named in a deed, and the process for that purpose, 33 H. 6. 19. and in Vin. Abr. Evidence H. a. and J. a.

(4) Acc. 1. Ro. Abr. 280. pl. 14. and

2. Inst. 662. See infra, n. 5.

(5) Acc. 4. Inst. 279. and the references supra in n. 4. But see 1. Ro. Rep. 83. Comb. 18. 57. Gilb. Law of Evid. 157. Law of Nisi Prius, 1st ed. 422.

Glav. lib. 10.  
ca. 12.  
Fleta lib. 6.  
ca. 33.

[h] Pasch. 10.  
Ja. in Com.  
Banco upon the  
stat. of bank-  
rupts.

(1. Brownl. 47.  
2. Ro. Abr. 584.  
Hutt. 115.  
Raym. 1.

1. Vent. 243.  
2. Keb. 193.  
1. Sid. 431.)

[i] Fleta lib. 2.  
ca. 44. 13 E. 1.  
tit. Vill. 36, 37.  
10 E. 2. 1264. 32.  
(Post. 28.)

[k] Tr. 6. Ja. in  
Com. Banco.  
Smith's case,  
in evidence

upon an  
information upon  
the statute  
of usury.

Brit. fo. 124.  
(Raym. 191.  
7. Mod. 118.)

(1. Sid. 51.  
2. Ro. Abr. 682.)  
(2. 2. 77.)

[f] Mirror  
cap. 1. sect. 6.  
and cap. 5.  
sect. 1.

Glanvil. lib. 10.  
cap. 12.  
Bract. lib. 5.  
fol. 306.

Fleta lib. 6.  
ca. 32.  
Brit. fo. 66.

[g] Vid. Treatise  
of the Law,  
verb. Fictio.

Vid. Glanvil.  
lib. 10. c. 12.  
Mirror. c. 1.

sect. 3. and c. 3. (2. Ro. Abr. 66. pl. 13. Cro. Eliz. 903.)

feoffment, if all the witnesses to the deed be dead (as no man can keep his witnesses alive, and time weareth out all men), then violent presumption, which stands for a proove, is continuall and quiet possession; for *ex diuturnitate temporis omnia presumuntur solenniter esse acta*. Also the deed may receive credit *per collationem sigillorum scripturae*, &c. *et super fidem cartarum mortuis testibus erit ad patriam de necessitate recurrendum*.

Note, it hath been resolved by the justices, that a wife [h] cannot be produced either against or for her husband (6), *quia sunt due anime in carne una*; and it might be a cause of implacable discord and dissection between the husband and the wife, and a meane of great inconvenience; but [i] in some cases women are by law wholly excluded to beare testimony; as to prove a man to be a villeine, *mulieres ad probationem status hominis admitti non debent*. It was also agreed by the whole court [k], that in an information upon the statute of usury, the partie to the usurious contract shall not be admitted to be a witness against the usurer, for in effect he should be *testis in propria causa*, and should avoyd his owne bonds and assurances, and discharge himselfe of the money borrowed; and though he commonly raise up an informer to exhibit the information, yet *in rei veritate* he is the partie (7). And herewith in effect agreeth Britton, that he that challengeth a right in [7. a.] the thing in demand, cannot be a witness, for that he is a party in interest (1). But now let us returne to that from the which by way of digression (upon this occasion) we are fallen.

And the ancient charters of the king, which passed away any franchise or revenue of any estate of inheritance, had ever this clause of *hinc testibus*, of the greatest men of the kingdome, as the charters of creation of nobility yet have at this day. When *hinc testibus* was omitted, and when *teste me ipso* came into the king's grants, you shall read in the Second Part of the Institutes (2), *Magna Charta* cap. 38. I have tearmed the said parts of the deed formall or orderly parts, for that they be not of the essence of a deed of feoffment; for if such a deed be without *premises, habendum, tenendum, reddendum*, clause of *warrantie*, the clause of *in cujus rei testimonium*, the *date*, and the clause of *hinc testibus*, yet the deed is good. [f] For if a man by deede give lands to another and to his heires without more saying, this is good, if he put his seale to the deede, deliver it, and make livery accordingly. [g] So it is if A. give lands to have and to hold to B. and his heires, this is good, albeit the feoffee is not named in the (3) premisses. And yet no well advised man will trust to such deeds, which the law by construction maketh good, *ut res magis valeat*; but when forme and substance concur, then is the deed faire and absolutely good. The sealing of charters and deeds is much more ancient than some

out

(6) [See N. 29.]

(7) [See N. 30.]

(1) [See N. 31.]

(2) [See N. 32.]

(3) [See N. 33.]

out of error have imagined (4); for the charter of king Edwyn, brother of king Edgar, bearing date *anno Domini* 956, made of the land called *Jecklea*, in the Isle of Ely, was not only sealed with his owne seale (which appeareth by these words, *ego Edwinus gratia Dei totius Britannica telluris rex meum donum proprio sigillo confirmavi*), but also the bishop of Winchester put to his seale, *ego Elfwinus, Winton. ecclesie divinus speculator, proprium sigillum impressi*. And the charter of king Offa, whereby he gave the Peterpence, doth yet remaine under seale. But no king of England before or since the Conquest sealed with any seale of armes before king R. 1. but the seale was the king sitting in a chaire on the one side of the seale, and on horsbacke on the other side in divers formes. And king R. 1. sealed with a seale of two lyons, for the Conqueror of England bare two lyons; and king John in the right of Aquitaine (the duke whereof bare one lyon) was the first that bare three lyons, and made his seale accordingly, and all the kings since have followed him. And king E. 3. in *anno* 13. of his raigne, did quarter the armes of France with his three lyons, and tooke upon him the title of king of France, and all his successors have followed him therein.

In ancient charters of feoffment there was never mention made of the delivery of the deed, or any livery of seisin indorsed; for certainly the witnesses named in the deed were witnesses of both: and witnesses either of delivery of the deed, or of livery of seisin, by expresse tearmes was but of later times, and the reason was in respect of the notoriety of the feoffment. And I have knowne some ancient deeds of feoffment having livery of seisin indorsed suspected, and after detected of forgerie. As if a deed in the stile of the king name him *defensor fidei* before 13 H. 8. or *supreme head* before 20 H. 8. at which time he was first acknowledged supreme head by the cleargy, albeit the king used not the stile of *supreme head* in his charters, &c. till 22 H. 8. or *king of Ireland* before 33 H. 8. at which time he assumed the title of *king of Ireland* (5), being before that called lord of Ireland, it is certainly forged; *et sic de similibus*.

And some have observed that *grace* was attributed to king H. 4. *excellent grace* to king H. 6, *majestic* to king H. 8, and before, the king was called *soveraigne lord*, *lige lord*, *highness*, and *kingly highnesse*, which in Latin in legall proceedings is called *regia celsitudo*; as the beginning of the petition of right to the king is *humillime supplicavit vestre celsitudini regia*, &c. and the like. And upon this occasion it shall not be impertinent, seeing it is part of the formall deed, to set downe the several stiles of the kings of England since the Conquest.

William the Conqueror commonly stiled himselfe *Willielmus rex*, and sometimes *Willielmus rex Anglorum*. And the like did William Rufus, and sometimes *Willielmus Dei gratia rex Anglorum*.

Henry the first, *Henricus rex Anglorum*, and sometimes *Henricus Dei gratia rex Anglorum*.

Mawde,

(4) See further as to the antiquity of and Nichols. Eng. Histor. Libr. 2d ed. sealing deeds, in Seld. Jan. Angl. b. 2. 241.  
c. 2. Mad. Form. Anglic. Dissert. p. 27. [5.] See post. 7. b. n. 1.

21 H. 8.  
cap. 16.

Vid. 2 H. 4.  
c. 15. where royall  
majesty is attribut-  
ed to the king, and  
crimen lese ma-  
jestatis facit mores  
ancient.

Mawde, the sole daughter and heire of H. 1. wrote *Matildis imperatrix Henrici regis filia et Anglorum domina*; divers of whose creations and grants I have seene.

King Stephen used the stile that king H. 1. did.

Henry the 2. Fitz-empress omitted *Dei gratia*, and used this stile, *Henricus rex Angliæ, dux Normanniæ et Aquitaniæ, et comes Andegaviæ*, he having the duchy of Aquitaine and earledome of Poitiers in the right of Elianor his wife heire to both, and the earldome of Anjowe Tournie and Maine, as sonne and heire to Jeffery Plantagenet by the said Mawde his wife, daughter and sole heire of king H. 1. She was first married to Henry the emperor, and after his death to the said Jeffery Plantagenet. Which duchie of Aquitaine doth include Gascoigne and Guien.

King R. 1. used the stile that H. 2. his father did; yet was he king of Cyprus, and after of Jerusalem, but never used either of them.

King John used that stile, but with this addition, *dominus [7. b.] Hiberniæ*; and yet all that he had in Ireland was conquered by his father king H. 2. which title of *dominus Hiberniæ* he assumed as annexed to the crowne, albeit his father, in the 23 yeare of his raigne, had created him king of Ireland in his lifetime (1).

King H. 3. stiled himselfe as his father king John did, untill the 44 yeare of his raigne, and then he left out of his stile, *dux Normanniæ, et comes Andegaviæ*, and wrote only *rex Angliæ, dominus Hiberniæ, et dux Aquitaniæ*.

King E. 1. stiled himselfe in like manner as king H. 3. his father did, *rex Angliæ dominus Hiberniæ, et dux Aquitaniæ*. And so did king E. 2. during all his raigne. And king E. 3. used the selfe same stile untill the 13 yeare of his raigne, and then he stiled himselfe in this forme, *Edwardus Dei gratia rex Angliæ et Franciæ, et dominus Hiberniæ*, leaving out of his stile *dux Aquitaniæ*. He was king of France as sonne and heire of Isabel wife of king E. 2. daughter and heire of Philip le Beau king of France. He first quartered the French armories with the English in his great seale, *anno domini 1338. et regni sui 14.*

King R. 2. and king H. 4. used the same stile that king E. 3. did. And king H. 5. untill the 8 yeare of his raigne continued the same stile, and then wrote himselfe *rex Angliæ, hæres et regens Franciæ, et dominus Hiberniæ*, and so continued during his life.

King H. 6. wrote *Henricus Dei gratia rex Angliæ et Franciæ, et dominus Hiberniæ*. This king being crowned in Paris king of France used the said stile 39 yeares, till he was dispossessed of the crowne by king E. 4. who after he had reigned also about ten yeares, king H. 6. was restored to the crowne againe, and then wrote, *Henricus Dei gratia rex Angliæ et Franciæ, et dominus Hiberniæ, ab inchoatione regni sui 49 et recaptionis regis potestatis primo.*

King E. 4. R. 3. and H. 7. stiled themselves, *rex Angliæ et Franciæ, et dominus Hiberniæ*.

King H. 8. used the same stile till the tenth yeare of his raigne, and then he added this word (*octavus*), as *Henricus octavus Dei gratia, &c.* In the 13 yeare of his raigne he added to his stile *fidei*

Vid. Rot.  
Parliam. anno  
1 H. 6. nu. 15.  
he was stiled rex  
Franciæ et Angliæ,  
et dominus Hiber-  
niæ.

(1) See further as to the deduction and change of the king's title in respect to Ireland, in Seld. Tit. Hon. b. 1. c. 4. s. 2.



*fidei defensor* (2). In the 22 yeare of his raigne, in the end of his stile he added, *supremum caput Ecclesie Anglicane* (3). And in the 23 yeare of his raigne he stiled himself thus, *Henricus octavus, Dei gratia Anglie Francia et Hibernie rex, fidei defensor, &c. et in terrâ ecclesie Anglicane et Hibernie supremum caput* (4).

King E. 6. used the same stile, and so did queene Mary in the beginning of her raigne, and by that name summoned her first parliament, but soone after omitted *supremum caput*. And after her marriage with king Philip, the stile notwithstanding that omission was the longest that ever was viz. *Philip and Mary, by the grace of God, king and queene of England and France, Naples, Jerusalem, and* (5) *Ireland, defenders of the faith, princes of Spain and Sicilie, archdukes of Austria, dukes of Millaine Burgundy and Brabant, countesses of Hasburgh Flanders and Tyroll*. And this stile continued till the fourth and fifth yeare of king Philip and queene Mary, and then Naples was put out and in place thereof both the Cicilies put in, and so it continued all the life of queene Mary.

I need not mention the stile of queene Elizabeth, king James, nor of our sovereigne lord king Charles, because they are so well knowne; and I feare I have beene too long concerning this point, which certainly is not unnecessary to be knowne for many respects. But to shew the causes and reasons of these alterations would aske a treatise of itselife (6), and doth not sort to the end that I have aimed at. And now let us returne to the learning of charters and deeds of feoffments and grants,

Very necessary it is that witnesses should be underwritten or indorsed, for the better strengthening of deeds, and their names (if they can write) written with their owne hands. For livery of seisin see hereafter, Sect. 59. and for deeds, Sect. 66. and of conditionall deeds see our author in his Chapter of Conditions. And now let us proceed to the other words of our author.

"*A tui et a ses heires.*" *Heres*, in the legall understanding of the common law, implyeth, that he is *ex iusto nuptiis procreatus*; for *heres legitimus est quem nuptiæ demonstrant*, and is he to whom lands, tenements, or hereditaments, by the act of God and right of blood do descend of some estate of inheritance. For *solus Deus heredem facere potest, non homo; dicuntur autem hereditas et heres ab herendo, quod est arctè insidendo, nam qui heres est heret; vel dicitur ab herendo, quia hereditas sibi heret, licet nonnulli heredem dictum velint, quod heres fuit, hoc est, dominus terrarum, &c. quæ ad eum perveniunt*.

A monster, which hath not the shape of mankind, cannot be heire or inherit any land, albeit it be brought forth within marriage; [a] but although he hath deformity in any part of his body, yet if he hath human shape he may be heire. *Hui qui contra formam humani generis conveo more procreantur, ut si mulier monstrosus vel prodigiosus enixa, inter liberos non computantur. Partas tamen cui natura*

Livery of seisin  
incident to a  
feoffment. VIII.  
Sect. 60.

Mirr. cap. 2.  
sect. 15. Bract.  
lib. 3. fo. 62. b.  
Flet. lib. 6. cap.  
1. & 54. & lib. 7.  
cap. 13. Glanvil.  
lib. 7. ca. 1. &  
ca. 12. & 13.  
(Post. 237. b.)

[a] Bract. lib. 2.  
fol. 437. 438.  
Brit. ca. 66. fol.  
167. & ca. 82.  
Fleta lib. 1. ca. 3.  
(Post. 29. b.)

- (2) [See N. 34.]  
(3) See Burn. Hist. Reform. v. 1. p. 136.  
(4) See the 35 H. 8. c. 3. which ratifies the king's stile.  
(5) [See N. 35.]  
(6) See further concerning the stiles of the

kings of England, and also of Great Britain, since the union of the two kingdoms, in Nichols. Eng. Histor. Libr. 2d ed. p. 248. and the several Treatises which have been published on the English Colours.

*natura aliquantulum ampliaverit vel diminuerit, non tamen superabundanter (ut si sex digitos vel nisi quatuor habuerit) bene debet inter liberos connumerari. Si inutilia natura reddidit, ut si membra tortuosa habuerit, non tamen is partus monstrosus.* Another [8. a.]

saith, *ampliatio seu diminutio membrorum non nocet.* [b] A bastard cannot be heire, for (as hath beene said before) *qui ex damnato coitu nascuntur inter liberos non computentur.* Every heire is either a male, or female, or an hermaphrodite, that is both male and female. And an hermaphrodite (which is also called *Androgynus*) shall be heire, either as male or female, according to that kind of the sexe which doth prevaile. *Hermaphrodita, tam masculo quàm femina comparatur, secundum prevalascentiam sexus incalescentis.* And accordingly it ought to be baptized. See more of this matter Sect. 35.

[c] A man seised of lands in fee hath issue an alien that is borne out of the king's ligeance; he cannot be heire, *propter defectum subjectionis* (1), albeit he be borne within lawfull marriage. If made denizen by the king's letters patent, yet cannot he inherit to his father or any other. But otherwise it is, if he be naturalized by act of parliament; for then he is not accounted in law *alienigena*, but *indigena*. But after one be made denizen, the issue that he hath afterwards shall be heire to him, but no issue that he had before. If an alien cometh into England and hath issue two sonnes, these two sonnes are *indigenæ*; subjects borne, because they are borne within the realme. And yet if one of them purchase lands in fee, and dyeth without issue, his brother shall not be his heire (2); for there was never any inheritable blood betwene the father and them; and where the sonnes by no possibility can be heire to the father, the one of them shall not be heire to the other. See more at large of this matter Sect. 198.

If a man be attainted of treason or felony, although he be borne within wedlocke, he can be heire to no man, nor any man heire to him, *propter delictum*, for that by his attainer his blood is corrupted. And this corruption of blood is so high, as it cannot absolutely be salved and restored but by act of parliament; for albeit the person attainted obtaine his charter of pardon, yet that doth not make any to be heire whose blood was corrupted at the time of the attainer, either downward or upward. [d] As if a man hath issue a sonne before his attainer, and obtaineth his pardon, and after the pardon hath issue another sonne, at the time of the attainer the blood of the eldest was corrupted, and therefore he cannot be heire. But if he die living his father, the younger sonne shall be heire; for he was not in *esse* at the time of the attainer, and the pardon restored the blood as to all issues begotten afterwards. But in that case if the eldest sonne had survived the father, the younger sonne cannot be heire: because he hath an elder brother which by possibilitie might have inherited: but if the elder brother had been an alien, the younger sonne should be heire, for that the alien never had any inheritable

(1) [See N. 36.]

(2) [See N. 37.]

[b] Vid. Sect. 188. 309. Bract. lib. 2. fo. 92. Brit. fo. Fleta lib. 1. ca. 5. &c. 1. 6. c. 8. Fleta ubi supra. 3 R. 2. entr. eong. 38.

[c] R. Ro. Abr. 625.)

[d] Miror ca. 1.

ca. 3. sect.

ca. 5. sect.

Bract. lib. 2.

fo. 415. 427.

Brit. fo. 29.

Fleta lib. 6.

ca. 47. 13 E. 3.

Br. 667.

36 E. 3. de natis

ultra mare.

31 E. 3.

Cousage 8.

48 E. 3. 2.

11 H. 4. 20.

14 H. 4. 19. 20.

3 H. 6. 55.

22 H. 6. 38.

9 H. 4. 7.

7. Co. 1. in

Calvin's case.

(Cro. Jam. 639.

Godb. 375.

1. Sid. 195. 201.

Noy 158. T. Jo. 10.

Vaugh. 374.

2. Sid. 23.

Hardr. 234.

3. Ventr. 1.)

1 Ed. 3. 4.

6 Ed. 3. 55.

27 E. 3. 77. 3 E. 2. discent.

Br. 64. 31 E. 1. discent. 17.

46 E. 3. Petition 20.

26. Ass. p. 2. 49. Ass. pl. 4.

20. Ass. pl. 11. 9 H. 5. 9.

[d] Stanf. pl. cor. 195. 196. Bract. lib. 3. fo. 132. 133. 276. & lib. 4. fo. 374. Britton fo. 215. b. Fleta l. 1. ca. 28. (Noy 170. Finch 8vo. ed. 207. Ante 2. b. Post. 129. Cro. Cha. 843. 1. Sid. 195. 202. 1. Ro. Abr. 635. Cro. Jam. 839.)

heritable blood in him (3). See more plentifully of this matter Sect. 746, 747.

If a man hath issue two sonnes, and after is attainted of treason or felony, and one of the sonnes purchase land and dieth without issue, the other brother shall be his heire; for the attainder of the father corrupteth the lineal blood onely, and not the collateral blood between the brethren, which was vested in them before the attainder, and each of them by possibility might have been heire to the father; and so hath it been adjudged (4). \* But otherwise in the case of the alien-née, as hath been said. [c] But some have holden, that if a man after he be attainted of treason or felony have issue two sonnes, that the one of them cannot be heire to the other, because they could not be heire to the father, for that they never had any inheritable blood in them (5).

[f] One that is borne deafe and dumbe may be heire to another, albeit it was otherwise holden in ancient time. And so if borne deafe dumbe and blinde, for *in hoc casu vitio porcitur naturali*. But contract they cannot. Ideots, leapers, madmen, outlawes in debt trespasses or the like, persons excommunicated, men attainted in a *premunire*, or convicted of heresie, may be heires.

[g] If a man hath a wife, and dyeth, and within a very short time after the wife marrieth againe, and within 9 months (6) hath a childe, so as it may be the childe of the one or the other, some have said, that in this case the childe may choose (7) his father, *quia in hoc casu filiatio non potest probari*, and so is the booke to be intended; for avoiding of which question and other inconveniences, this was the law before the Conquest, *Sit omnia vidua sine marito duodecim mensibus, et si maritaverit perdat dotem* (8).

[h] A man by the common law cannot be heire to goods or chattels, for *heres dicitur ab hereditate*. [i] If a man buy divers fishes, as carps, breames, tenches, &c. and put them in his pond, and dyeth, in this case the heire shall have them, and not the executors, but they shall goe with the (9) inheritance; because they were at libertie, and could not be gotten without industrie, as by nets, and other engines. Otherwise it is, if they were in a trunke or the like. Likewise deere in a parke, conies in a warren, and doves in a dove-house, young and old, shall goe to the (10) heire. [k] But of ancient time the heire was permitted to have an action of debt upon a bond made to his auncestor and his

*hæc hereditarium or principallus*, Sect. 12.

(3) Besides the authorities in the margin, see W. Jo. 34.

(4) S. p. acc. Noy 158. 4. Leon. 3.

(5) [See N. 38.]

(6) [See post. 123. b. where this is said to be the utmost time the law supposes a woman to go with child, and the authorities,

which the reader will find there cited on the subject.

(7) [See N. 39.]

(8) [See N. 40.]

(9) Acc. Cro. Eliz. 372.

(10) [See N. 41.]

\* In the Exchequer M.C. 40 & 41 Eliz. in le case de Hobby,

[c] Bract. lib. 3.

fol. 130. Brit.

fol. 15. Fleta

lib. 1. cap. 98.

(1. Sid. 183.

1. Lev. 60.

Vaugh. 374.

1. Ventr. 414.)

[f] Bract. lib.

5. fo. 431. 430.

434. lib. 2. fo. 13.

Fleta lib. 6.

ca. 39. 47.

14 H. 3.

bre. 477.

32 E. 3. Ago 8.

10 E. 3. 535.

18 E. 3. 43.

13 E. 3.

Ley 49.

(1. Ro. Abr. 626.)

[g] 31 E. 3. 39.

Fancroill. nova

rep. 488. &c.

Opus eximium

48. b. Damhard

de priscis Anglo-

rum legibus,

130. 72. acc.

(1. Ro. Abr.

357. Cro. Jam.

541. 3. C. Godb.

281.)

[h] Bract. lib. 4.

ca. 9. fo. 265.

lib. 2. fo. 62. b.

Fleta lib. 6.

ca. 1. & Co. 54.

Sym's case.

[i] Mich. 26. & 37.

El. Rot. 25. inter

Gray and Paulet.

the King's bench.

Stanford 25. b.

18 E. 4. 8.

32. Ass. 25.

18 H. 8. 2.

[k] 13 E. 3. det.

135. 139. 140.

47 E. 3. 23.

25 E. 3. fo. 48.

26 E. 3. fo.

Val. for an heire.

his heires; but the law is not so holden at this day. *Vid.* Sect. 12.

[1] It is to be noted, that one cannot be heire till after the death of his auncestor. Before he is called *heres apparens*, heire apparent.

In our old bookes and records there is mention made of another heire, *viz. heres astrarius*, so called of *astre*, that is, [8. b.] an harth of a house; because the auncestor by conveyance hath set his heire apparent, and his family, in a house and living in his life-time, of whom Bracton saith thus, [a] *Item esto, quod heres sit astrarius, vel quod aliquis antecessor restituat heredem in vita sua hereditatem, et se dimiserit, videtur, quod nullo tempore jacebit hereditas, et ideo quod nec relevari possit, nec debeat, nec relevium dari.* [b] For the benefit and safety of right heires *contra partus suppositos*, the law hath provided remedie by the writ *de ventre inspiciendo*, whereof the rule in the Register is this: *Nota, si quis habens hereditatem duxerit aliquam in uxorem, et postea moriatur ille sine herede de corpore suo exeunte, per quod hereditas illa fratri ipsius defuncti descendere debeat, et uxor dicit se esse pregnantem de ipso defuncto cum non sit, habeat frater et heres breve de ventre inspiciendo.* It seemeth by Bracton, and Fleta which followed him, that this writ doth lie, *ubi uxor alicujus in vita viri sui se pregnantem fecit cum non sit, vel post mortem viri sui se pregnantem fecit cum non sit, ad exheredationem veri heredis, &c. ad querelam veri heredis per preceptum domini regis, &c.* which is to be understood according to the rule of the Register. When a man having lands in fee simple dieth, and his wife soon after marrieth againe, and faines herself with childe by her former husband, in this case though she be married, the writ *de ventre inspiciendo* doth lie (1) for the heire. But if a man seised of lands in fee (for example) hath issue a daughter, who is heire apparent, she in the life of her father cannot have this writ for divers causes. First, because she is not heire, but heire apparent; for, as hath been said, *nemo est heres viventis*; and this writ is given to the heire to whom the land is descended. And both Bracton and Fleta say, that this writ lyeth *ad querelam veri heredis*, which cannot be in the life of his auncestor; and herewith agreeth Britton and the Register. Secondly, the taking of a husband in the case aforesaid being her owne act, cannot barre the heire of his lawfull action once vested in him (2). Thirdly, the law doth not give the heire apparent any writ, for it is not certaine whether he shall be heire, *solus Deus facti heredes*. Fourthly, the inconvenience were too great, if heires apparent in the life of their auncestor should have such a writ to examine and trie a man's lawfull wife in such sort as the writ *de ventre inspiciendo* doth appoint; and if she should be found to be with childe, or suspect, then she must be removed to a castle, and there safely kept until her delivery, and so any man's wife might be taken from him against the lawes of God and man.

The words of the writ *de ventre inspiciendo* make this evident. *Rex vic. salutem. Monstravit nobis A. quod cum R. quæ fuit uxor Clementis B. pregnant non sit, ipsa falso dicit se esse pregnantem de eodem Clemente, ad exheredationem ipsius A. denuc terra quæ fuit ejusdem C. ad ipsum A. jure hereditario descendere debeat tanquam ad fratrem et heredem ipsius ac si predicti R. prolem de eo non habuerit,*

(1) [See N. 42.]

(2) [See N. 43.]

[1] Mirror pa. 1.  
sect. 5.

[a] Bract. lib. 2.  
p. 35. Heres.  
p. 8. E. 1. R.  
p. 8. de Banco.  
Mirror cap. 3.  
sect. 18. Britton  
151. b.  
[b] Registr. fo.  
307. Bracton  
lib. 2. fo. 60.  
Britton fo. 165.  
Fleta lib. 1.  
pa. 14.  
Cro. Eliz. 306.  
Cro. Jam. 486.]

Britton fo. 165.  
by Registr. ubi  
supra.

Vid. Bracton.  
Britton & Fleta  
ubi supra.  
Registr. ubi  
supra. Bracton  
and Fleta ubi  
supra. have (ad  
exheredationem  
regni.)

*habuerit, &c.* But this rather belongs to the treatise of original writs, and therefore thus much herein shall suffice (3).

And it is to be observed, that every word of Littleton is worthy of observation. First (Heires) in the plurall number; for if a man give land to a man and to his heire in the singular number, he hath but an estate for life, for his heire cannot take a fee simple by descent, because he is but one, and therefore in that case his heire shall take (4) nothing. Also observable is this conjunctive (*et*). For if a man give lands to one, To have and to hold to him or his heires, he hath but an (5) estate for life, for the uncertaintie (*ses, suis*). If a man give land unto two, To have and to hold to them two *et hereditibus* [c], omitting *suis* (6), they have but an estate for life, for the uncertainty; whereof more hereafter in this Section. But it is said, if land be given to one man *et hereditibus*, omitting *suis*, that notwithstanding a fee simple passeth; but it is safe to follow Littleton.

[d] "*Et ses assignes.*" Assignee cometh of the verb *assigno*. And note there be assignes in deed, and assignes in law; whereof see more in the Chapter of Warrantie, Sect. 733.

"*Ceux parolx (ses heires) tant seulement font l'estate d'enheritance en toutes feoffments et grants.*" [c] *Si autem facta esset donatio, ut si dicam, do tibi talem terram, ista donatio non extendit ad heredes sed ad vitam donatori, &c.* [f] Here Littleton treateth of purchases by naturall persons, and not of bodies politique or corporate; [g] for if lands be given to a sole body politique or corporate, (as to a bishop, parson, vicar, master of an hospital, &c.) there to give him an estate of inheritance in his politique or corporate capacitie, he must have these words, To have and to hold to him and his successors; for without these words *successors*, in those cases there passeth no inheritance (7); for as the heire doth inherit to the ancestor, so the successor doth succeed to the predecessor, and the executor to the testator. [h] But it appeareth here by Littleton, that if a man at this day give lands to *J. S.* and his successors, this createth no fee simple in him; for Littleton speaking of naturall persons saith that these words (his heires) make an estate of inheritance in all feoffments and grants, whereby he excludeth these words (his successors). [i] And yet if it be an ancient grant, it must be expounded as the law was taken at the time of the grant. [k] A chantry priest in-

[9. a.] corporate took a lease to him and his successors for a hundred yeares, and after tooke a release from the leasor to him and his successors; and it was adjudged, that by the release he had but an estate for life, for he had the lease in his naturall capacity, for it could not go in succession (1), and (his successors) gave him

[c] 10 H. 6. 7.  
22 H. 6. 15.  
Pl. Com. 28. b.  
23 E. 4. 16.  
2 H. 4. 13.  
20 E. 3. huc. 377.

[d] 5. Co. 66. 97.  
Brit. fo. 28.  
H. 8. Dyer. Pl.  
Com. 287, 288.  
(Post. 22. a.)  
5. Co. 112.)

[e] Bract. lib. 2.  
cap. 30. fo. 92. b.  
Br. ca. 39. fo. 99.  
b. Fleta lib. 6.  
ca. 1. s. 8.  
lib. 3. cap. 2.  
20 H. 6. 35, 36.  
19 H. 6. 17. 32.  
74. 23 E. 4.  
16. b. 4 E. 6.  
Pl. Com. 26.  
[f] Vid. Sect.  
413.  
[g] 7 E. 3. 25.  
Vid. Sect. 686.  
24 E. 3. 34.  
Bract. lib. 2.  
fo. 62. b.  
Vid. Sect. 413.  
(5. Co. 112.)  
1. Leon. 2.)  
[h] Pl. Com.  
243. Scignior  
Barthley's case.  
[i] Vid. Brit.  
fo. 86. 121. & 130.  
17 E. 3. 25. b.  
33 H. 6. 22.  
10 H. 7. 13, 14.  
9 H. 7. 11.  
16 H. 7. 9.  
15 E. 4. 15.  
14 E. 6. 12.  
35 H. 6. 34.  
24. Ass. 14.  
40. Ass. 21.  
(Post. 94.)  
Tr. 5. E. 3.  
Ret. 4. in Seacoe-  
rio.

3 E. 3. 32. 7 E. 3. 40. 11 H. 4. 84. 13 H. 4. 12. 18 E. 3. Conuener 39. b. 5 E. 4. 121. 38 E. 3. 4. Co. 3. 28 in Case de Abb. de Strata Marcella. [k] Hil. 21 Eliz. Dyer's manuscript, inter Andley and Johnson in Com. Ban. (4 Co. 66.)

(3) [See N. 44.]

(4) [See N. 45.]

(5) See 5 Co. 112. post. 214. & Plowd. 286. 289. in which last book it is particularly considered, where the *disjunctive* shall

be construed as the *conjunctive*.

(6) See 2 Ro. Abr. 833. M. & Vin. Abr. Estate, M.

(7) [See N. 46.]

(1) [See N. 47.]

[7] 18 H. 6. 11.  
b. &c. adjudge.

[m] 18 E. 3.  
Ric. Countersplein  
de Voucher 43.  
37 H. 6. 30.  
11 E. 4. 2.  
(Cro. Jām. 374.  
6. Co. 16. b.  
1. Leon. 357.)

[n] Fleta Eb. 3.  
cap. 8.  
Pl. Com. 163.

[a] Sect. 17.  
62. 133.

[b] Sect. 186.  
161.

[c] Sect. 194.  
[d] Sect. 190.  
194. 746.

[e] Sect. 9. 67.  
194. 304. 234.  
238. 241. 498.  
495. 478. 681.  
655. 660. 680.  
614. 637. 674.  
692.

[f] Sect. 733.

[g] Tr. 40. Eli.  
in le Count de  
Derby's case,  
by the Lo.  
Chancellor,  
les 3 chiefe  
Justices, & chiefe  
Baron.

him no estate of inheritance for want of these words (his heires).

[7] If the king by his letters patent giveth lands *decano et capitulo, habendum sibi et heredibus et successoribus suis*; in this case, albeit they be persons in their naturall capacity to them and their heires, yet because the grant is made to them in their politique capacity, it shall enure to them and their successors. And so if the king do grant lands to *I. & habendum sibi et successoribus sive heredibus suis*, this grant shall enure to him and his heires.

[m] B. having divers sonnes and daughters. A. giveth lands to *B. et liberis suis, et a lour heires*, the father and all his children do take a fee simple joyntly by force of these words (their heires); (2) but if he had no childe at the time of the feoffment, the childe borne afterward shall not take (3).

These words (his heires) doe not onely extend to his immediate heires; but to his heires remote and most remote, borne and to be borne, [n] *sub quibus vocabulis (heredibus suis) omnes heredes propinqui comprehenduntur, et remoti, nati, et nascituri*. And *heredum appellatione veniunt heredes heredum in infinitum*. And the reason wherefore the law is so precise to prescribe certaine words to create an estate of inheritance, is for avoiding of uncertainty, the mother of contention and confusion.

There be many words so appropriated, as that they cannot be legally expressed by any other word, or by any periphrasis or circumlocution. Some to estates of lands, &c. as here and in [a] other places of our author. In this place these words *tantselement*, not *solement*, alone, but *tantselement*, all onely, i. e. *solummodo* or *duntaxat*, are to be observed. [b] Some to tenures; [c] some to persons; [d] some to offences; [e] some to forms of original writs, either for recovery of right, or removing, or redresse of wrong; [f] some to warrantie of land. These have I touched for examples. I leave others to the studious reader to observe, and add, holding this for an undoubted verity, that there is no knowledge, case, or point in law, seeme it of never so little account, but will stand our student in stead at one time or other, and therefore in reading, nothing to be pretermitted.

"*Font l'estate,*" *Status dicitur à stando*, because it is fixed and permanent. The Isle of Man, which is no part of the kingdom, but a distinct territory of itselfe, hath beene granted by the great scale to divers subjects and their heires. [g] It was resolved by the lord chancellor, the two chiefe justices and chiefe baron, that the same is an estate descendible according to the course of the common law; for whatsoever state of inheritance passe under the great scale of England, it shall be descendible according to the rules and course of the common law of England (4).

"*En tous feoffments et grants.*" Here it giveth the feoffments the first place, as the ancient and the most necessary conveyance, both for that it is solemne and publike, and therefore best remembered and proved,

(2) [See N. 48.]

(3) [See N. 49.]

(4) S. C. 4. Inst. 284. and 2. And. 115.  
See further concerning the Isle of Mann in  
Pryn. on 4. Inst. 201. 384. Hale's Hist.

Com. L. 183. Palm. 344. 1. P. Wms. 329,  
1. Ves. 202. 2. Ves. 337. 1. Blackst.  
Comment 5th ed. p. 104. and Camp. Polit.  
Surv. of Brit. v. 1. p. 524.

proved, [\*] and also for that it cleareth all disseisins, abatements, intrusions, and other wrongfull or defeasible estates, where the entry of the feoffor is lawfull, which neither fine, recovery, nor bargain and sale by deede indented and inrolled doth. And here is implied a division of fee, or inheritance, viz. [A] into corporeall, as lands and tenements which lie in livery, comprehended in this word feoffment, and may passe by livery by deed, or without deed, which of some is called *hereditas corporata*, and incorporeall, (which lie in grant, and cannot passe by livery, but by deede, as advowsons, commons, &c. and of some is called *hereditas in corporata*, and, by the delivery of the deede, the freehold, and inheritance of such inheritance, as doth lie in grant, doth passe) comprehended in this word Grant. And the deed of incorporeate inheritances doth equall the livery of corporeate. And therefore *Littleton* saith, in all feoffments and grants, *hereditas, alia corporalis, alia incorporealis: corporalis est, quæ tangi potest et videri; incorporealis, quæ tangi non potest, nec videri.*

*Feoffment* is derived of the word of art *feodum*, quia est donatio feodi; for the antient writers of the law called a feoffment *donatio*, of the verb *do* or *dedi*, which is the aptest word of feoffment (5). And that word *Ephron* used\*, when he enfeoffed Abraham, saying, I give thee the field of Machpelah over-against Mamre, and the cave therein I give thee and all the trees in the field and the borders round about; all which were made sure unto Abraham for a possession, in the presence of many witnesses.

By a feoffment the corporeate fee is conveyed, and it properly betokeneth a conveyance in fee, as our author himselfe hereafter saith, † in his Chapter of Tenant for Life. And yet sometime improperly it is called a feoffment when an estate of freehold onely doth passe: *done est noame generall plus que n'est feoffment, car done est generall a toutes choses moebles et nient moebles, feoffment est riens forsque del soyle.* And note, there is a difference inter *carta* et *factum*;

[9. b.] for *carta* is intended a charter which doth touch inheritance, and so is not *factum*, unless it hath some other additions (1).

*Grant, concessio*, is properly of things incorporeall, which, (as hath been said) cannot passe without deed. And here it is to be observed, (that I may speak once for all) that every period of our author in all his three books contains matter of excellent learning, necessarily to be collected by implication, or consequence. For example he saith here, that these words (*his heires*) make an estate of inheritance in all feoffments and grants. He expressing feoffments and grants, necessarily implyeth, that this rule extendeth not.

First, to *last wills and testaments*; for thereby, [†] as he himselfe after saith, an estate of inheritance may passe without these words (*his heires*). [‡] As if a man devise 20 acres to another, and that he shall pay to his executors for the same ten pound, hereby the devisee

[\*] Vide Sect. 59 and 66.

[A] *Mirror* c. 2. sect. 15. & c. 1. sect. 1. *Bract.* lib. 2. fo. 53. 366. 368. *Pleta* lib. 3. ca. 1. 2. 12. *Britt.* 24. 27. 2. & fol. 63. 101. 102. 141. 142. agreeth herewith *Pl. Com.* 171. *Hill & Grange.*

*Mirror* ca. 5. sect. 1. *Britton* cap. 34. For the antiquity of Feoffments, see the Second Part of the *Institutes*, *Marlbridge*, ca. 9. 8 E. 3. 24. 18 H. 6. 14. 30 H. 6. 30. \* *Genesis* 23.

† Vide Sect. 57. *Britton* cap. 34. 44 E. 3. 41. See more of Feoffments, Sect. 60. See of *Factum*, Sect. 259. 3 Co. 63, in *Lincolne Colledge case*. (1. Ro. Abr. 833, 6. Co. 16. b.)

[†] *Litt. lib.* 3. c. de *Attorn.* Sect. 5. 8. 6. 4 E. 6. *Retates* Br. 79. 22 H. 8. *Testaments* 18. 23 *Eliz. Dier* 371. *Temps.* H. 8. tit.

Conscience Br. 25. (3. Co. 31.) [‡] 21 E. 3. 10. 34 H. 6. 7. 19 H. 8. 9. 3. Co. 21. In *Boraston's case*, 6. Co. 16, 17. 10 Co. 67.

(5) See more as to the word *feoffment*, in *Mad. Formul. Angl. Dissert.* p. 3. 2 *Inst.* 110.

(1) See further as to the distinction be-

tween *charters* and *deeds*, and the various other names of writings before and since the Conquest, in *Mad. Formul. Angl. Dissert.* p. 2. and *Mad. Hist. Exch. Pref. Ep.* p. 8.

[7] Vide Sect.  
585.

[m] Mich. 40 and  
41 Eliz. in Error  
int. Downhall and  
Catesby adj.  
Brooke tit. Taile  
21.

[n] 1. Co. 100.  
Sandys's case.  
42 E. 3. 7.  
19 H. 6. 17. b.  
22. b.  
Pl. Com. 248.

[o] Litt. lib. 2.  
ca. Tenant in  
Common. Sect.  
304, 305. cap.  
Attorn. Sect.  
374. Dier.  
9 Eliz. 263.  
[p] Litt. lib. 3.  
c. Releases.  
Sect. 479, 480.  
20 H. 6. 17.  
19 H. 6. 17. 32.

[q] Litt. cap.  
Releases, Sect.  
467.

27 H. 6. 16.  
Vesely's case.  
7. Co. 33. b.)

visée hath a fee simple by the intent of the deviser (2), albeit it be not to the value of the land. [7] So it is if a man devise lands to a man *in perpetuum*, or to give and to sell, or in *feodo simplici*, or to him and to his assigns for ever. In these cases a fee simple doth passe by the intent of the deviser. But if the devise be to a man and his assigns without saying (for ever), the devisee hath but an estate for life. [m] If a man devise land to a man *et sanguinis suo*, that is a fee simple; but if it be *semini suo*, it is an estate taile (3).

[n] Secondly, that it extendeth not to a *fine sur conusance de droit come ceo que il ad de son done*, by which a fee also may passe without this word (heires) in respect of the height of that fine, and that thereby is implied that there was a precedent gift in fee.

Thirdly, nor to *certain releases*, and that three manner of waies.

[o] First, when an estate of inheritance passeth and continueth; as if there be three coparteners or joyntenants, and one of them release to the other two, or to one of them generally without this word (heirs), by *Littleton's* own opinion they have a fee simple, as appeareth hereafter. 2. By release [p], when an estate of inheritance passeth and continueth not, but is extinguished; as where the lord releaseth to the tenant, or the grantee of a rent, &c. release to the tenant of the land generally all his right, &c. hereby the seignior, rent, &c. are extinguished for ever, without these words (heires). 3. [q] When a bare right is released, as when the disseisor release to the disseisor all his right, he need not (saith our author in another place) speake of his heires. But of all these, and the like cases, more shall be treated in their proper places. 4. Nor to a *recovery*. *A.* seised of land suffereth *B.* to recover the land against him by a common recovery, where the judgment is, *quodd predictus B. recuperet versus pred. A. tenementa predicta cum pertinent'*; yet *B.* recovereth a fee simple without this word (heires; for regularly every recoverer recovereth a fee simple. 5. Nor to a *creation of nobilitie by writ*; for when a man is called to the upper house of parliament by writ, he is a baron and hath inheritance therein without the word (heires). (4) Yet may the king limit the generall state of inheritance created by the law and custome of the realme to the heires males, or generall, of his body by the writ; as he did to *Bromflete*, who in 27 H. 6. was called to parliament by the name of the lord *Vescey*, &c. with the limitation in the writ to him and the heires males of his bodie. But if he be created by patent, he must of necessitie have these words (his heires) or the heires males of his bodie, or the heires of his body, &c. otherwise he hath no inheritance. The first creation of a baron by patent that I find was of *John Beauchamp*, of *Holte*, created baron by patent in 11. R. 2 (5) for barons before that time were called by writ. And it is to be observed, that of ancient times earles, &c. were created by girding them with a sword, and nominating him earle, &c. of such a countie or place; and this, with a calling of him to parliament by writ by that name, was a sufficient creation of inheritance.

But

(3) See N. 50.]

(3) As to the passing of an estate of inheritance in *last wills*, without the word *heirs*, see the title *Devisee*, in the several Abridgments of Law and Equity, and *Gilb. Law of Devises*.

(4) Sec as to this, *mr. serj. Rolle's* argu-

ment in *Coll. Proc. on Claims of Baronies*, 209. 221;

(5) *Acc. post.* 16. b. *Seld. Jan. Angl.* b. 2. c. 15. and *Seld. Tit. Hon.* 2d ed. p. 747. which latter book contains the form of the letters patent to lord *Beauchamp*.



But out of this rule of our author the law doth make divers exceptions (*et exceptio probat regulam*); for sometime by a feoffment a fee simple shall passe without these words (his heires). For example, first, [r] if the father infeoffe the sonne, to have and to hold to him and to his heires, and the sonne infeoffeth the father as fully as the father infeoffed him, by this the father hath a fee simple, (6) *quia verba relata hoc maximè operantur per referentiam ut in esse videntur*. [s] Secondlie, in respect of the consideration, a fee simple had passed at the common law without this word (heires), and at this day an estate of inheritance [in] tayle. As if a man had given land to a man with his daughter in frankmarriage generally, a fee simple had passed without this word (heires); for there is no consideration so much respected in law as the consideration of marriage, in respect of alliance and posteritie. [t] Thirdly if a feoffment or grant be made by deed to a mayor and commonaltie, or any other corporation aggregate of manie persons capable, they have a fee simple without the word (successors); (7) because in judgment of the law they never dye. [u] Fourthly, in case of a sole corporation a fee simple shall sometimes passe without this word (successors). As if a feoffment in fee be made of land to a bishop, to have and to hold to him *in liberâ elemosinâ*, a fee simple doth passe without this word (successors). [w] And so if a man give lands to the king by deede inrolled, a fee simple doth passe without these words (successors or heires); because in judgment of law the king never dieth. Fifthly, in grants sometimes an inheritance shall passe without this

[10. a.] word (heires). [x] As if partition be made betweene coparceners of lands in fee simple, and for owelty of partition the one grant a rent to the other generally, the grantee shall have a fee simple without this word (heires) (1); because the grantor hath a fee simple, in consideration whereof he granted the rent: *Ipsæ etenim leges cupiunt ut jure regantur*. Sixthly, by the Forrest law if an assart be granted by the king at a justice seat (which may be done without charter) to another, *habendum et tenendum sibi in perpetuum*, he hath a fee simple without this word (heires) [y]; for there is a speciall law of the forest, as there is a law marshall for wars, and a marine law for the seas [z].

And this rule of our author extendeth to the passing of estates of inheritances in exchanges, releases, or confirmations that enure by way of enlargement of estates, warranties, bargain and sales by deed indented and inrolled, and the like, in which this word (heires) is also necessary; for they do tantamount to a feoffment or grant, or stand upon the same reason that a feoffment or grant doth; for like reason doth make like law, *ubi eadem ratio, ibi idem jus* (2). And this is to be observed throughout all these three books, that where other cases fall within the same reason, our author doth put his case but for example; for so our author himselfe in another place\* explaneth it, saying, *et memorandum que en tous autres [tiels] cases, comment que ne sont icy expressément moves et spécifiées, si sont en semblable reason*

[r] 39. Ass. 12.  
41 E. 3. tit.  
Feoffments and  
Facts 254.  
14 H. 4. 13.  
34 E. 3. Avowry  
268.  
[s] Vide Sect.  
17. 13 H. 4. 19.  
in Formedon.

[t] 8 E. 3. 27.  
11 H. 7. 12.  
23 E. 4.  
11 H. 4. 84.  
3 H. 4. 13.

[u] 19 H. 6. 74.  
20 H. 6. 36.  
(1 Ro. Abr. 43.)

[w] Pl. Com.  
Lo. Berkeley's  
case.

[x] 39. Ass. 25.  
15 H. 7. 14.  
2 H. 7. 5.  
11 H. 4. 3.  
21 E. 3. 1.  
31. Ass.

[y] 40 H. 7. 7.  
(4. Inst. 314.)  
[z] 23 E. 3. 3.  
45 E. 2. 20.  
6 E. 3. 22.  
4. Co. 1.  
Bustard's case.  
Vide Sect. 465.  
469. 610.  
19 H. 6. 17. 22.  
19 E. 2. garn. 55.

\* Sect. 304.

(6) Adj. contra 39. lib. Ass. pl. 12. but Rolle abridges the case with a *quere*. Sec 1. Ro. Abr. 833: pl. 7.

(7) [See N. 51.]

(1) Acc. Plowd. 134. b.

(2) For other instances in which a fee will

pass by deed or grant without the word *heire*, see Vin. Abr. *Estate*, K. 2. and L. To the cases in Viner, add 8 H. 4. 4. 16. b. 19 H. 6. 17. 20 H. 6. 36. 27 H. 8. 8. b. Dy. 169. which I do not see cited by him. See also Ash. Receptor. tit. *Estate*.

(Post. 10. b.  
Dy. 133. b.  
Hob. 31.  
L. Co. 101, 103.)

*reason sont en assemble ley.* And here our author is to be understood to speak of heires when they are inheritable by descent, for they are capable of land also by purchase, and then the course of descent is sometimes altered. As if lands of the nature of gavelkind be given to *B.* and his heires, having issue divers sons, all his sons after his decease shall inherit (3); but if a lease for life be made, the remainder to the right heires of *B.* and *B.* dieth, his eldest son only shall inherite, for he only to take by purchase is right heire by the common law (4). So note a diversity betweene a purchase and a descent. But where the remainder is limited to the right heires of *B.* it need not be said, and to their heires: for being plurally limited it includeth a fee simple, and yet it resteth but in one by purchase.

27 H. 8. ca. 16,  
28 H. 8. ca. 2,  
24 H. 8. ca. 5,

Out of that which hath beene said it is to be observed, that a man may purchase lands to him and his heires by ten manner of conveyances (for I speake not here of estoppells). First, by feoffment. Secondly, by grant (of which two our author here speaketh). Thirdly, by fine, which is a feoffment of record. Fourthly, by common recovery, which is a common conveyance, and is in nature of a feoffment of record. Fifthly, by exchange, which is in nature of a grant. Sixthly, by release to a particular tenant. Seventhly, by confirmation to a particular tenant, both which are in nature of grants. Eighthly, by grant of a reversion or remainder with attornment of the particular tenant, of all which our author speaketh hereafter. Ninthly, by bargaine, and sale by deede indented and inrolled, ordained by statute since *Littleton* wrote. Tenthly, by devise by custome of some particular place, as he sheweth hereafter, and since he wrote, by will in writing, generally by authority of parliament.

Sect. 531,  
27 Am. p. 2,  
28 Am. p. 5,  
3 R. 2. 5, &c.

What words are apt words for a feoffment or grant *vide* Sect. 531. Our author speaketh of feoffments and grants, whereby is implied lawfull conveyances; and therefore this rule extendeth not to disseisins, abatements, or intrusions into lands or tenements, or to usurpations to advowsons, &c. in which cases estates in fee simple are gained by the act and wrong of the disseisors, abators, intruders, and usurpers (5); and if a disseisin, abatement, or intrusion be made to the use of another, if *cestui que use* agreeth thereunto in *frays*, by this bare agreement he gaineth a fee simple without any livery of seisin or other ceremony.

(3) [See N. 52.]  
(4) [See N. 53.]

(5) See ante 3. b. and post. 18. b.

## Sect. 2.

**E**T si home purchase terres en fee simple et devy sans issue, chescun que est son prochein cosin collateral del entire sanke, de quel plus long degree qu'il soit (6), poet inheriter et aver meme la terre come heire a luy.

**A**ND if a man purchase land in fee simple and die without issue, he which is his next cousin collateral of the whole blood, how farre so ever he be from him in degree, may inherite and have the land as heire to him.

**L**ITTLETON sheweth here who shall be heire to lands in fee simple; for he intendeth not this case of an estate taile, for that he speaketh of an heire of the whole blood, for that extendeth not to estates in taile, as shall be said hereafter in this Chapter, Section 6.

(Flowd. 444)

"Prochein cosin collateral." Neither excludeth he brethren or sisters, because he hath a special case concerning them in this Chapter, Sect. 5. and in his Chapter of Parceners; but this is intended where a man purchaseth lands and dieth without issue, [10. b.] and having neither brother nor sister, then his next cousin collateral shall inherite (1). So as here is implied a division of heires, viz. lineall (whoever shall first inherite) and collateral (who are to inherite for default of lineall). For in descents it is a *maxime* in law, *quod linea recta semper prefertur transversali*. Lineall descent is conveyed downward in a right line; as from the grandfather to the father, from the father to the sonne, &c. Collateral descent is derived from the side of the lineall; as grandfather's brother, father's brother, &c. Prochein cousin collateral enheritera doth give a certain direction to the next cousin to the sonne, and therefore the father's brother and his posterity shall inherite before the grandfather's brother and his posterity. Et sic de ceteris; for *propinquior excludit propinquum, et propinquus remotum, et remotus remotiorem*.

Upon this word (*prochein*) I put this case. One hath issue two sonnes, *A.* and *B.* and dieth; *B.* hath two sonnes, *C.* and *D.* and dieth. *C.* the eldest sonne hath issue and dieth. *A.* purchaseth lands in fee simple, and dieth without issue. *D.* is the next cousin, and yet shall not inherite, but the issue of *C.*; for he that is inheritable is accounted in law next of blood. And therefore here is understood a division of *next*, viz. next *jure representationis*, and next *jure propinquitatis*; that is, by right of representation and by right of propinquity. And Littleton meaneth of the right of representation, for legally in course of descents he is next of blood inheritable. And the issue of *C.* doth represent the person of *C.*; and if *C.* had lived, he had been legally the next of blood. And whensoever the father, if he had lived, should have inherited, his lineall heire by right of representation shall inherite before any other, though another be *jure propinquitatis*, neerer of blood. And therefore Littleton intendeth his case of next cousin of blood immediately inheritable. So as this produceth another division of next blood, viz.

immediately

Glanvill. lib. 7.  
ca. 3, 4.  
Bract. lib. 2.  
c. 30. fo. 65.  
Britton c. 119.  
Fleta lib. 6.  
cap. 1. & 2.  
(Flowd. 444.)  
Bract. lib. 2.  
cap. 30. fo. 64.  
Fleta lib. 6.  
cap. 1. & 2.  
Britton c. 119.  
Mirror 11.  
cap. 1. sect. 3.  
30. Ass. p. 47.  
(3. Co. 40. 42.)

19 E. 2. 116  
Garr. 100.

(3. Inst. 7.)

(6) de lui, L. and M. Roh. Red.

(1) [See N. 54.]

36. Ass. p. 47.

immediately inheritable, as the issue of *C.*; and mediately inheritable as *D.* if the issue of *C.* die without issue; for the issue of *C.* and all that line, be they never so remote, shall inherit before *D.* or his line; and therefore *Littleton* saith well, *de quel plus long degre que il soit.* And here ariseth a diversity in law between next of blood inheritable by descent, and next of blood capable by purchase. And therefore in the case before mentioned, if a lease for life were made to *A.* the remainder to his next of blood in fee; in this case, as hath been said, *D.* shall take the remainder, because he is next of blood and capable by purchase, though he be not legally next to take as heire by descent (2).

## Séct. 3.

**M**ES si soit pier et fils, et le pier ad un frere que est uncle a le fils, et le fils purchase terre en fee simple et mort sans issue, vivant son pier, l'uncle atera la terre come heire al fils, et nemy le pier, uncore le pier est plus prochein de sanke; pur ceo que est un maxime en le ley, que inheritance poet linealment discender, mes nemy (3) ascender. Uncore si le fils en tiel case mort sans issue, et son uncle entra en la terre come heire a le fils (sicome il devoit per la ley) et apres l'uncle decia sans issue, vivant le pier, donques le pier atera la terre come heire al uncle, et nemy come heire a son fils, pur ceo que il veigne al terre per collateral discent et nemy per lineal uscention.

**B**UT if there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee simple, and die without issue, living his father, the uncle shall have the land as heir to the son, and not the father, yet the father is neerer of blood; because it is a maxime in law, that inheritance may lineally descend, but not ascend. Yet if the son in this case die without issue, and his uncle enter into the land as heire to the some (as by law he ought) and after the uncle dieth without issue, living the father, the father shall have the land as heire to the uncle, and not as heire to his sonne, for that he commeth to the land by collateral discent and not by lineall ascent.

8 E. 6. tit. Ad-  
ministr. Br. 47.  
Ratcliffe's case  
ubi sup. See  
after in the  
Chapter of  
Socage.

(Hob. 33.)

(3. Co. 40.)

[p] Pl. Com.  
593. b.  
Osborne's case.

(Port. 67.)  
[q] Pl. Com. 27.  
b. (3. Co. 40.)

**U**NCORE le pier est plus prochein de sanke." And therefore some do hold upon these words of *Littleton*, that if a lease for life were made to the sonne, the remainder to his next of blood, that the father should take the remainder by purchase, and not the uncle, for that *Littleton* saith the father is next of blood, and yet the uncle is heire. As if a man hath issue two sons, and the eldest sonne hath issue a sonne and die, a remainder is limited to the next of his blood, the younger son shall take it, yet the other is his heire.

"[p] Est un maxime en le ley, que inheritance poet linealment discender, mes nemy ascender."

*Maxime*, i. e. a sure foundation or ground of art, and a conclusion of reason, so called [q] *quia maxima est ejus dignitas* [11. a.] *et certissima autoritas, atque quod maxime omnibus probetur*, so sure and

(2) [Sec N. 55.]

(3) *linealment*—P. and Red.

and uncontrollable as that they ought not to be questioned. [r] And that which our author here and in other places calleth a maxime, hereafter he calleth a principle; and it is all one with a rule, a common ground, postulatium, or an axiome, and it were too much curiositie to make nice distinctions betweene them. And it is well said in our bookes, [s] *n'est my a disputer l'ancien principes del ley*. I never read any opinion in any booke old or new against this maxime, but only in lib. rub. where it is said [t] *si quis sine liberis decesserit, pater aut mater ejus in hereditatem succedat, vel frater et soror si pater et mater desint; si nec hos habeat, soror fratris vel matris, et deinceps qui propinquiore in parentela fuerint hereditario succedant; et dum virilis sexus extiterit, et hereditas abinde sit, femina non hereditat*. But all our ancient authors and the constant opinion ever since do affirme the maxime.

By this maxime in the conclusion of his case, onely lineall ascension in the right line is prohibited, and not in the collateral. [u] *Qualibet hereditas naturaliter quidem ad hæredes hereditabiliter descendit, nunquam quidem naturaliter ascendit. Descendit itaque jus quasi ponderosum, quod cadens deorsum rectâ lineâ vel transversali, et nunquam reascendit eâ viâ quâ descendit post mortem antecessorum, à latere tamen ascendit alicui propter defectum hæredum inferius provenientium*; so as the lineall ascent is prohibited by law, and not the collateral (1). And in prohibiting the lineall ascent, the common law is assisted with the law of the 12 tables (2).

Here our author for the confirmation of his opinion draweth a reason and a prooffe (as you have perceived) from one of the maximes of the common law. Now that I may here observe it once for all, his proofes and arguments, in these his three books, may be generally divided into two parts, viz. from the common law and from statutes, of both which, and of their several branches, I shall give the studious reader some few examples, and leave the rest to his diligent observation.

For the common law his proofes and arguments are drawn from 20 several fountaines or places.

[a] First, from the maximes, principles, rules, intendment and reason of the common law, which indeed is the rule of the law, as here and in other places our author doth use.

[b] Secondly, from the bookes, records, and other authorities of law cited by him *ab autoritate, et pronunciatia*.

[c] Thirdly, from originall writs in the Register, *à rescriptis valet argumentum*.

[d] Fourthly, from the forme of good pleading.

[e] Fifthly, from the right entyre of judgements.

[f] Sixthly, *à præcedentibus approbatis et usu*, from approved precedents and use.

[g] Seventhly, *à non usu*, from not use.

[h] Eightly, *ab artificialibus argumentis consequentibus et conclusionibus*, artificiall arguments, consequents and conclusions.

Ninthly,

[i] 108. 735.

[A] Sect. 170. 264. 283. 302. 420. 464. 620. 633. 686. 340. 418. 613. 686. 730.

[r] Sect. 90. 848.

[s] 12 H. 4.  
Glanvill. lib. 7.  
cap. 1. Bract.  
lib. 2. cap. 29.  
[t] Lib. Rub.  
cap. 70.

[u] Brit. cap.  
110. Fleta lib.  
ca. 1. Numb.  
ca. 27. Ratcliffe's  
case ubi supra.  
(3. Co. 40.)

[a] Sect. 8. 9.  
90. 96. 93. 53.  
87. 69. 65. 90.  
120. 146. 186.  
160. 178. 231.  
263. 302. 352.  
360. 376. 377.  
396. 410. 440.  
441. 340. 347.  
462. 43.

[b] Sect. 20.  
where a number  
of others are  
quoted.

[c] Sect. 67. 132.  
170. 234. 241.  
263. 613. 614.  
(Plowd. 228.)

[d] Sect. 68.  
170. 183. 309.

[e] Sect. 248. 249.

[f] Sect. 88. 74.  
76. 148. 332.  
371. 372. 445.

(1) [See N. 56.]

(2) [See N. 57.]

[i] Sect. 697.  
59. 104. 238.  
352. 478.  
[k] Sect. 87.  
where many  
others are  
quoted.  
[l] Sect. 13.  
where many  
more are quot-  
ed; but see  
chiefly Sect. 321.  
[m] Sect. 438,  
439. 441.  
[n] Sect. 18.  
[o] 301. &c.  
[p] 301. 308.  
400, &c.  
[q] 139. 440.  
[r] Sect. 46.  
194.  
[s] Sect. 300.  
[t] Sect. 732.  
[u] Sect. 114.  
223. 190. 211.  
107, 108.  
[v] Sect. 302.  
[w] Sect. 440.  
[x] Sect. 481.

[x] Sect. 13, &c.  
Sect. 731. 692.  
638. 633. 441.  
103. 193. 184.  
140. 2.  
(Flowd. 87. b.  
49. b.)  
[y] Sect. 464.  
(Cro. Ja. 474.)  
[z] Sect. 731. 685.  
(Flowd. 108.)

[a] 17 E. 3.  
Rot. Parl. no.  
19. 25 E. 3.  
cap. 1. Regist.  
inter Jura regia  
61, &c.  
(Post. 360.)  
[b] Commonly  
spoken of in  
Parliament  
Rolls.  
(4. Inst. 14.  
Post. 15. b.)  
[c] 13 E. 4. 9.  
7. Co. Calvin's  
case. Pl. Com.  
Sharington's  
case.  
(Dr. and Stud.  
Dial. 1. a. 2.)  
[d] This law  
appeareth in our  
books and  
judiciall records.  
[e] These are of  
record in Rolls of  
Parliament.  
[f] Wherof you  
shall read in our  
author, and in our  
bookes.

[g] Rot. Parl. 2  
H. 3. nu. 3. 13 R. 2. ca. 2. (Post. 249.)  
Fortesc. ca. 32. 13 H. 4. 4. 28 H. 8. ca. 15.

Ninthly, [i] *à communi opinione jurisprudentium*, from the common opinion of the sages of the law.

Tenthly, [k] *ab inconvenienti*, from that which is inconvenient.

Eleventhly, [l] *à divisione*, from a division, *vel ab enumeratione partium*, from the enumeration of the parts.

Twelfthly, [m] *à majore ad minus*, from the greater to the lesser, or [n] from the lesser to the greater [o] *à simili* [p] *à pari*.

13. † *Ab impossibili*, from that which is impossible.

14. [q] *A fine*, from the end.

15. [\*] *Ab utili vel inutili*, from that which is profitable or unprofitable.

16. [r] *Ex absurdo*, for that thereupon shall follow an absurditie, *quasi à surdo prolatum*, because it is repugnant to understanding and reason.

17. [s] *A naturâ et ordine nature*, from nature, or the course of nature.

18. [t] *Ab ordine religionis*, from the order of religion.

19. [u] *A communi presumptione*, from a common pre- [11. b.]  
sumption.

20. [w] *A lectionibus jurisprudentium*, from the readings of learned men of law.

From statutes his arguments and proofes are drawne.

1. [x] From the rehearsall or preamble of the statute.]

2. By the bodie of the law diversly interpreted.

Sometime by other parts of the same statute, which is *bene dicta expositio, et ex visceribus causæ*.

[y] Sometime by the reason of the common law. But ever the generall words are to be intended of a lawfull act, [z] and such interpretation must ever be made of all statutes, that the innocent or he in whom there is no default may be dam-  
nified (1).

"*En la ley*." There be divers lawes within the realme of England. As first, [a] *Lex coronæ*, the law of the crowne.

2. [b] *Lex et consuetudo parliamenti*. *Ista lex est ab omnibus querenda, à multis ignorata, à paucis cognita*.

3. [c] *Lex naturæ*, the law of nature.

4. [d] *Communis Lex Angliæ*, the common law of England, sometime called *lex terræ*, intended by our author, in this and the like places.

5. [e] Statute law. Lawes established by authority of parliament.

6. [f] *Consuetudines*, Customes reasonable.

7. [g] *Jus belli*, the law of armies, war, and chivalrie, *in republicâ maxime conservanda sunt jura belli*.

8. [h] Ecclesiastical or canon law in courts in certaine cases.

9. [i] Civil law in certaine cases not onely in courts ecclesiastical,\* but in the courts of the constable and marshall, and of the admiraltie, in which court of the admiraltie is observed *la ley Olyron*,

\* For an elementary introduction to the Civil and Canon Law,  
see Mr. Butler's *Hore Jurædicæ Subsecivæ*, Oct. 1804.

[h] 7. Co. Candrie's case. articul. super cartas, &c. [i] 37 H. 6. 21.

(1) As to the construction of statutes, see  
Jord ch. Hatt. Treat. on Stat.—Ash.

Expos. Stat. by Eq.—Vin. Ab. Statutes,  
E. 6.—Com. Dig. Parliament. R. 10.

anno 5 of Richard the first, so called, because it was published in the isle of Olyron.

10. [k] *Lex foresta*, forest law.
11. [l] The law of marque or reprisall (2).
12. [m] *Lex mercatoria*, merchant, &c.
13. [n] The lawes and customes of the isles of Jersey, Guernsey, and Man.
14. [o] The law and privilege of the Stannaries.
15. [p] The lawes of the east, west, and middle Marches, which are now abrogated.

But hereof this little taste for our student, that he may be capable of that which he shall reade concerning these and others in records, and in our books, and orderly observe them, shall suffice.

Parl. 6 H. 4. an. 43. 10 H. 7. 16. 47 E. 3. 22. 30 E. 1. Account 137.  
 31 E. 1. Rot. Patent. (4. Inst. 237.) [n] Mich. 41 E. 3. coram rege in Thesaur. 19 E. 3. s. b. 12 H.  
 2. an. 6. Rot. Pat. an. 20 E. 1. 7. Co. Calvin's case, fol. 21. Regist. fol. 22. [o] 50 E. 3. Rot. Parl. 20 E.  
 2. Rot. Patent, &c. [p] 31 H. 6. ca. 3. 4. Ja. c. 1.

[k] Carta de Foresta, &c. the chiro of the Forests.

[l] 27 E. 3. ca. 17. Wl. ca. 23. 4 H. 5. ca. 7.

[m] Mirrour des Just. c. 1. Bract. 334. 444. Fleta lib. 2. ca. 61, 62, &c.

5 E. 3. 11.

38 E. 3. 7.

27 E. 3. cap. 8.

Fortaque 32.

F. N. B. 117.

13 E. 4. 9. Rot. Carta Mercatoria.

"*Et son uncle enter en la terre.*" For if the uncle in this case doth not enter into the land, then cannot the father inherite the land; for there is another maxime in law herein implied, [g] that a man, that claimeth as heire in fee simple to anie man by descent, must make himselfe heire to him that was last seised of the actuall freehold and inheritance (3). And if the uncle in this case doth not enter, then had he but a freehold in law, and no actuall freehold, but the last that was seised of the actuall freehold was the sonne to whom the father cannot make himselfe heire; and therefore Littleton saith, *et son uncle enter en la terre (sicome devoit per la ley)* to make the father to inherite, as heire to the uncle. [r.] Note, that true it is that the uncle in this case is heire, but not absolutely heire; for if after the descent to him the father hath issue a sonne or daughter, that issue shall enter upon the uncle (4). [s.] And so it is if a man hath issue a sonne and a daughter, the sonne purchaseth land in fee and dyeth without issue, the daughter shall inherite the land; but if the father hath afterward issue a sonne, this sonne shall enter into the land as heire to his brother, and if he hath issue a daughter and no sonne, she shall be coparcener with her sister.

[g] 11 H. 4. 11.

10. An. 27.

34. An. p. 20.

19 E. 2. quar. impd. 177.

45 E. 3. 13.

40. An. p. 6.

[r] 11. An. p. 6.

Doct. and Stud. 12. b.

32 H. 6. 35.

[s] 19 H. 6. 61.

"*Sicome il devoit per la ley.*" These words as a key doe open the secrets of the law; for hereupon it is concluded, that where the uncle cannot get an actuall possession by entrie or otherwise, there the father in this case cannot inherit. And therefore if an advowson be granted to the sonne and his heires, and the sonne die without issue, and this descend to the uncle, and he die before he doth or can present to the church, the father shall not inherit, because he should make himselfe heire to the sonne, which he cannot doe. And so of a rent and the like. But if the uncle had presented to the church, or had seisin of the rent, there the father should have inherited. For Littleton putteth his case of an entry into land but for an example. If the sonne make a lease for life, and die without issue, and the reversion descend to the uncle, and he die, the reversion shall not descend to the father, because in that case he must make

(2) Besides the books more generally known, see Lee's Capt. in War, which is a Treatise on this subject.

(3) [See N. 58.]

(4) [See N. 59.]

make himself heire to the sonne. *A.* infeoffes the son with warrantie to him and his heires, the sonne dies, the uncle enters into the land and dies, the father if he be impleaded shall not take the advantage of this warrantie, for then he must vouch *A.* as [12. a.] heire to his sonne, which he cannot doe (1); for albeit the warrantie descended to the uncle, yet the uncle leaveth it as he found it, and then the father by *Littleton's* (*devoit*) cannot take advantage of it. For *Littleton* Sect. 603. saith that warranties shall descend to him that is heire by the common law; and Sect. 718, he saith that everie warrantie which descends, doth descend to him that is heire to him which made the warrantie by the common law; which proveth that the father shall not be bound by the warrantie made by the sonne, for that the father cannot be heire to the sonne, that made the warrantie. And a warrantie shall not goe with tenements, whereunto it is annexed, to any especiall heire, but alwaies to the heire at the common law (2). And therefore if the uncle be seised of certaine lands, and is disseised, the sonne release to the disseisor, with warrantie, and die without issue, this shall bind the uncle; but if the uncle die without issue, the father may enter, for the warrantie cannot descend upon him. So if the sonne concludeth himselfe by pleading concerning the tenure and services of certaine lands, this shall bind the uncle; but if the uncle die without issue, this shall not bind the father, because he cannot be heire to the sonne, and consequently not to the estoppel in that case; but if it be such an estoppel as runneth with the land, then it is otherwise (3).

Vid. Sect. 603.  
718.  
(Post. 329.)

Vid. Sect. 736,  
736, 737.

35 H. 6. 33.  
John Crook's  
case.  
(3. Co. 79.)

## Sect. 4.

**E**T en tiel case lou le fts purchase terre en fee simple, et devie sauns issue, ceux de son sanke de part son pier enheriteront come heires a luy, derant aucun de sanke de part sa mere: mes s'il n'ad aucun heire de part son pier, donques la terre descendra a les heires de part la mere (4). Mes si home prent (5) enheretrix des terres en fee simple, queux ont issue fils, et derient, et le fts enter en les tenements, come fts et heire a sa mere, et puis devie sans issue, les heires de part la mere doient enheriter les tenements, et j'annues les heires de part le pier.

Et

**A**ND in case where the sonne purchaseth land in fee simple, and dies without issue, they of his blood on the father's side shall inherite as heires to him, before any of the blood on the mother's side: but if he hath no heire on the part of his father, then the land shall descend to the heires on the part of the mother. But if a man marrieth an inheretrix of lands in fee simple, who have issue a sonne, and die, and the sonne enter into the tenements, as sonne and heire to his mother, and after dies without issue, the heires of the part of

(1) [See N. 60.]

(2) See acc. both as to estoppels and warranties, Hob. 31. 8. Co. 54. But observe what is said by lord Hale in the preceding note.

(3) [See N. 61.]

(4) Et cest l'opinion de toutes les justices M. 12 E. 4. Mes la fuit tenu si terre descende a un home de part son pere, qui devia sans issue, que son prochain heire de part son pere enheritera a luy cest assavoir le prochain que est del sank le pere de part layel. Et pur

defaute de tiel heire, ceux que sont de sank le pere del part le mere le pere, S. laillesse doient enheriter. Et s'il ny ad tiel heire de part le pere donques le seignour a vera el terre par eschete. Red. But this passage is not in any edition prior to Redman's, and seems an addition to Littleton by another hand, and to be an opinion extracted from 12 E. 4. 14. pl. 12. which is indeed cited in the margin of Redman.

(5) feme, L. and M.—Roh.—P.—Red.



Et s'il ny ad aucun heire de part la mere, dunque le seignior, de que la terre est tenus, avera la terre per escheat. (1) En mesme le manner est, si tenements descendont a le fils de part le pier, et il enter, et puis morust sans issue, cel terre descendra as heires de part le pier, et nemy as heires de part la mere. Et s'il ny ad aucun heire de part le pier, dunque le seignior de que la terre est tenus, avera la terre per escheat. Et sic vide diversitatem, lou le fits purchase terres ou tenements en fee simple, et lou il voient oins a tiels terres ou tenements per discent de part sa mere, ou de part son pier.

of the mother ought to inherit, and not the heires of the part of the father. And if he hath no heire on the part of the mother, then the lord, of whom the land is holden, shall have the land by escheate. In the same manner it is, if lands descend to the sonne of the part of the father, and he entreth, and afterwards dies without issue, this land shall descend to the heires on the part of the father, and not to the heires on the part of the mother. And if there be no heire of the part of the father, the lord of whom the land is holden, shall have the land by escheate. And so see the diversity, where the sonne purchaseth lands or tenements in fee simple, and where he cometh to them by descent on the part of his mother, or on the part of his father.

BY this it appeareth, that our author divideth heires into heires of the part of the father, and into heires of the part of the mother. [a] And note, it is an old and true maxime in law, that none shall inherit any lands as heire, but only the blood of the first purchaser, for *\*refert à quo, fiat perquisitum*. As for example, Robert Coke taketh the daughter of Knightley to wife, and purchaseth lands to him and to his heires, and by Knightley hath issue Edward, none of the blood of the Knightleys, though they be of the blood of Edward, shall inherit, albeit he had no kindred but them, because they were not of the blood of the first purchaser, viz. of Robert Coke (6).

34 E. 3. 24. 37. Am. 4. 40 E. 3. 9. 42 E. 3. 10. 48 E. 3. Release 28. 7 H. 5. 3, 4. 8. Am. 6. 35. Am. 2. 8 E. 4. 7. 3 H. 5. 21 H. 7. 33. 40. Am. 6. Ratcliff's case, 3. Co. 42. (Post. 220. b.)

"[b] *Ceux del sang de part son pier.*" Here it is to be understood, that the father hath two immediate bloods in him, viz. the blood of his father, and the blood of his mother (7). both these bloods are of the part of the father. [c] And this made ancient authors say, that if a man be seised of lands in the right of his wife, and is attainted of felony, and after hath issue, this issue should not inherit his mother, for that he could derive no blood inheritable from the father. And both these bloods of the part of the

[12. b.] father must be spent before the heire of the blood of the part of the mother shall inherit, wherein ever the line of the male of the part of the father, (that is) the posteritie of such male, be they male or female, (who ever in descents are preferred) must faile before the line of the mother shall inherit. [d] And the reason of all this is, for that the blood of the part of the father is more worthie, and more meere in judgement of law, than the blood of the part of the mother.

"*Devant*

(1) All between *en mesme* and *sic vide* omitted in Red.

(6) And therefore if the heir of the part of the

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father be attainted, the land shall escheat. 49. Ass. p. 4. Hal. MSS.

(7) [See N. 62.]

Vid. Sect. 364. an excellent point.

[a] Pl. Com. Sir Edward Croke's case 447. [c] Fleta lib. 2. c. 1. 2. Feo. Bracton lib. 2. fol. 65. 67, 68, 69, &c. Britton ca. 119. 24 E. 3. 20. 30 E. 3. 20. 30. 32. 40 E. 3. 12. 40. Am. p. 4. 12 E. 4. 14. Pl. Com. 445 & 450. 7 E. 6. Dyer 6. 35. Am. 2. 8 E. 4. 7.

[b] Bracton ubi supra. Fleta ubi supra. Britton c. 119. 119. Pl. Com. 444. Croke's case. Tr. 19 E. 1. in. Rameo. rot. 25. Lincoln Will. Seel's case. [c] Britton. fol. 15. Fleta, lib. 1. c. 18. Pl. Com. 445, 446, &c. Croke's case. (1 Sid. 300.) (Flowd. 444.) [d] 19 H. 2. Gaiz. 100.

Britton cap. 118.  
119.  
Fleta lib. 6.  
cap. 2.

“*Devant ascun del sanke del part del mere.*” And it is to be observed, that the mother hath also two immediate bloods in her, (viz.) her father’s blood, and her mother’s blood. Now to illustrate all this by example. *Robert Fairfeild*, sonne of *John Fairfeild* and *Jane Sandie*, takes to wife *Ann Boyes*, daughter of *John Boyes* and *Jane Bewprece*, and hath issue *William Fairfeild*, who purchaseth lands in fee. Here *William Fairfeild* hath foure immediate bloods in him, two of the part of his father, viz. the blood of the *Fairfeilds*, and the blood of the *Sandies*, and two of the part of his mother, viz. the blood of the *Boyes*, and the blood of the *Bewpreces*, and so in both cases upward in infinitum. Now admit that *William Fairfeild* die without issue, first the blood of the part of his father, viz. of the *Fairfeilds*, and for want thereof the blood of the *Sandies* (for both these are of the part of the father) if both these faile, then the heires of the part of the mother of *William Fairfeild* shall inherit, viz. first the blood of the *Boyes*, and for default thereof the blood of the *Bewpreces*.

It is necessary to be knowne in what cases the heire of the part of the mother shall inherit, and where not. If a man be seised of lands as heire of the part of his mother, and maketh a feoffment in fee, and taketh backe an estate to him and to his heires, this is a new purchase, and if he dyeth without issue, the heires of the part of the father shall first inherit. (2) If a man so seised maketh a feoffment in fee upon condition, and dye, the heire of the part of the father, which is the heire at the common law, shall enter for the condition broken, but the heire of the part of the mother shall enter upon him, and enjoy the land. [m] A man so seised maketh a feoffment in fee reserving a rent to him and to his heires, this rent shall goe to the heires of the part of the father; but [n] if he had made a gift in taile, or a lease for life reserving a rent, the heire of the part of the mother shall have the reversion, and the rent also as incident thereunto shall passe with it; but the heire of the part of the mother shall not take the advantage of a condition annexed to the same, because it is not incident to the reversion, nor can passe therewith. [o] If a man had been seised of a mannor as heire on the part of his mother, and before the statute of *Quia emptores terrarum*, had made a feoffment in fee of parcell to hold of him by rent and service, albeit they be newly created, yet for that they are parcell of the mannor, they shall with the rest of the mannor descend to the heire of the part of the mother, *quia multa transcunt cum universitate qua per se non transcunt*. If a man hath a rent secke of the part of his mother, and the tenant of the land granteth a [13. a.] distresse to him and to his heires, and the grantee dieth, the distresse shall go with the rent to the heire of the part of the mother, as incident or appertenant to the rent, for now is the rent secke become a rent charge (1).

[p] A man so seised as heire on the part of his mother maketh a feoffment in fee to the use of him and his heires, the use being a thing in trust and confidence shall ensue the nature of the land (2), and shall descend to the heire on the part of the mother. [q] A man hath a seignory as heire of the part of his mother, and the tenancy doth escheat, it shall go to the heire of the part of the mother. If the heire of the part of the mother of land whereunto

a warranty

(2) [See N. 63.]

[13. a.]

(1) Acc. 8. Co. 54. a.

(2) [See N. 64.]

9 H. 7. 34.  
(Plowd. 87.  
Post. 302.)

[m] 7 H. 6. 4.  
1 Co. 100.  
Shelley’s case.

[n] 5 E. 2. d.  
avowry 307.  
(Hob. 31.)

[o] 5 E. 3.  
avowry 307.  
(8 Co. 44.  
3 Co. 33. b.)

[p] 5 E. 4. 4.  
1 Co. 100.  
Shelley’s case.  
27 H. 3. Dy. r.  
Buckenhau’s  
case. 32 H. 8.  
gard. Brooke 93.  
13 H. 7. 6.  
(2) Ro. Abr. 780.  
Post. 23. a. 271.  
b. 1. Co. 127.  
Hob. 31. 2. Co.  
58.)  
[q] 16 E. 3.  
age 46.

a warrantie is annexed is impleaded and vouches, and judgment is given against him, and for him to recover in value, and he dieth before execution [r], the heire of the part of the mother shall sue execution to have in value against the vouchee, for the effect ought to pursue the cause, and the recompence shall ensue the losse.

If a man giveth lands to a man, to have and to hold to him and his heires on the part of his mother, yet the heires of the part of the father shall inherit, for no man can institute a new kind of inheritance not allowed by the law, and the words (of the part of his mother) are void, as in the case that *Littleton* putteth in this Chapter. If a man giveth lands to a man to him and his heires males, the law rejecteth this word males, because there is no such kind of inheritance, whereof you shall read more in his proper place.

A man hath issue a sonne, and dieth, and the wife dieth also, lands are letten for life, the remainder to the heires of the wife, the sonne dieth without issue, the heires of the part of the father shall inherit, and not the heires of the part of the mother, because it vested in the sonne as a purchaser. And the rule of *Littleton* holdeth as well in other kind of inheritances, as in lands and tenements. [s] And therefore if there be lord, *feme mesne*, and tenant, and the mesne bind her selfe and her heires by her deed to the acquittall of the tenant, the mesne takes husband, the tenant by his deed granted to the husband and his heires, that he or his heires shall not be bound to acquittall, the husband and wife have issue, and die, this issue, being bound as heire to his mother, shall not take benefit of the said grant of discharge, for that extends to the heires of the part of the father, and not to the heires of the part of the mother, and therefore the heire of the part of the mother was bound to the acquittall (3). And this much for the better understanding of *Littleton's* cases concerning the heire of the part of the mother shall suffice (4).

"*Mes si homo prius fuit femine hereditrix, &c.*" Here there is another maxime, [t] that whensoever lands do descend from the part of the mother, the heires of the part of the father shall never inherit. And likewise when lands descend from the part of the father, the heires of the part of the mother shall never inherit (5). *Et sic paterna paternis, et de converso, materna maternis*. For more manifestation hereof, and of that which hereafter shall be said touching descents, see a Table in the end of this Chapter.

"*Avera la terre per escheat.*" [u] *Escheat* (6), *eschaeta*, is a word of art, and derived from the French word *escheat* (*id est*) *cadere, excidere* or *accidere*, and signifyeth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee is escheated. And therefore, of some, *escheats* are called *excadentia* or *terra excadentialis* [w]. *De minus vero capitalis loco*

[r] Pl. Com. 202 and 215. See more of this in the Chapter of Warranties.

(Post. 27. a.)

[s] 30 E. 3. 12.

[t] 30 E. 3. 29.  
49 E. 3. 12.

[u] Vide Sect. 130. Glanvill. lib. 7. cap. 17. Bract. lib. 3. fol. 118. Fleta lib. 5. cap. 5. & lib. 3. cap. 10. Britton cap. 37. & cap. 110. F. N. B. 100. Tr. 10. E. 1. in Banco Rot. 25.

(3) Inst. 21. 4. Inst. 235. F. N. B. 144. b.)

[w] Fleta lib. 6. cap. 1. Ockam cap. quod non absolvitur, &c.

(3) [See N. 65.]

(4) [See N. 66.]

(5) [See N. 67.]

(6) See Wright's Ten. 115. Blackst. Law Tracts. 8vo. ed. v. 1. p. 236. and 2. Blackst. Comm. 5th ed. 241.

*loco hæredis habetur, quoties per defectum vel delictum extinguitur sanguis cui tenentis. Loco hæredis et haberi poterit cui per modum donationis fit reversio cujusque tenementi.* And Oookham (who wrote in the raigne of Henry the second) treating of tenures of the king, saith, *porro eschaeta vulgò dicuntur, quæ decedentibus hils quæ de rege tenent, &c. cum non existit ratione sanguinis hæres, ad fiscum relabuntur.* [x] So as an escheat doth happen two manner of wayes, *aut per defectum sanguinis*, i. e. for default of heire, *aut per delictum tenentis*, i. e. for felonie, and that is by judgment three manner of waies, *aut quia suspensus per collum, aut quia abjuravit regnum, aut quia ullegatus est.* And therefore, they which are hanged by martiall law in *furorè bellì* forfeit no lands: and so in like cases escheats by the civilians are called *caduca*.

[y] The father is seized of lands in fee holden of *I. S.* the son is attainted of high treason, the father dieth, the land shall escheat to *I. S.* *propter defectum sanguinis*, for that the father dyed without heire. And the king cannot have the land, because the sonne never had any thing to forfeit. But the king shall have the escheate of all the lands wherof the person attainted of high treason was seized, of whomsoever they were holden (7).

[z] In an appeale of death or other felony, &c. processe is awarded against the defendant, and hanging the processe the defendant conveyeth away the land, and after is outlawed, the conveyance is good (8) and shall defeat the lord of his escheat; but if a man be indicted of felony, and hanging the processe against him, he conveyeth away the land, and after is outlawed, the conveyance shall not in that case prevent the lord of his escheate. And the reason of this diversity is manifest: for in the case of the appeale the writ containeth no time when the felony was done, and therefore the escheate can relate but to the outlawry pronounced. But the indictment containeth the time when the felony was committed, and therefore the escheate upon the outlawry shall relate to that time (1). Which cases I have added, to the end the student may conceive, that the observation of writs, indictments, processe, judgments, and other entries, doth conduce much to the understanding of the right reason of the law.

Of this word (*eschaeta*) here used by our author, commeth [a] *Escheator*, an ancient officer so called, because his office is properly to look to escheats, wardships, and other casualties belonging to the crowne. In ancient time there were but two escheats in *England*, the one on this side of *Trent*, and the other beyond *Trent*, at which time they had subescheators. But in the raigne of *Edward*, the second, the offices were divided, and severall escheators made in every county for life, &c. and so continued untill the raigne of *Edward* 3. And afterwards by the statute of 14 E. 3. it is enacted by authority of Parliament, that there should be as many escheators assigned, as when king *Edward* 3. came to the crown, and that was one in every county, and that no escheator should tarry in his office above a yeare, and by another statute to be in office but once in three yeares. The lord treasurer nameth him.

And herof also commeth *eschetria*, which signifieth the escheatorship, or the office of the escheator. But now let us heare what our author will further say unto us.

[x] Pl. Com.  
Same Hale's  
case.  
(Fost. 66. b.)

[y] Pl. Com. in  
Richard's case.

[z] 34 E. 3.  
237. 30 H. 6. 4.  
Banc. b. 2. tit.  
de Forf. Stamp.  
Pl. Cor. 102.  
and according  
to this diversity  
it is resolved  
in 2. E. 6. as it  
appeareth by  
my lord Dyer's  
Manuscript.  
(Fost. 390. b.)  
(Fost. 217.  
Dyer 172.)

[a] Mirror ca. 1.  
Sect. 5. 51 H. 3.  
statutum de  
Hære. Britan.  
c. 33. 34.  
Flet. lib. 1.  
cap. 36. & lib. 2.  
cap. 34. 35.  
Regist. 301. his  
Duch 10 P. 1.  
Ro. Parl. 31 E. 1.  
Rot. Parl. 1.  
39 E. 1.  
stat. de Eschea-  
toribus. 14 E. 3.  
c. 3. 26 E. 1.  
ca. 18. F. N. B.  
100. c. Stamp.  
Dyer. 21.  
2 H. 6. ca. 8.  
2 H. 6. ca. 3.  
Capitula  
Escheatoris in  
v. Magna  
Carta, c. 160.  
191. &c.

(7) [See N. 68]  
(8) [See N. 69]

(1) [See N. 70.]

"*Et sic vide, &c.*" This kind of speech is often used by our author, and doth ever import matter of excellent observation, which you may find in the Sections noted in the margin.\*

And it is to be well observed, that our author saith, *s'il n'ad aucun heire, &c. la terre escheatera*. In which words is implied a diversity (as to the escheate) betweene fee simple absolute, which a natural body hath, and fee simple absolute, which a body politique or incorporate hath. [6] For if land holden of *J. S.* be given to an abbot and his successors, in this case if the abbot and all the convent die, so that the body politique is dissolved, the donor shall have againe this land, and not the lord by escheat (2). And so if land be given in fee simple to a deane and chapter, or to a maior and commonalty, and to their successors, and after such body politique or incorporate is dissolved, the donor shall have again the land, and not the lord by escheate. And the reason and the cause of this diversity is, for that in the case of a body politique or incorporate the fee simple is vested in their politique or incorporate capacity created by the policy of man, and therefore the law doth annex the condition in law to every such gift and grant, that if such body politique or incorporate be dissolved, that the donor or grantor shall re-enter, for that the cause of the gift or grant faileth; but no such condition is annexed to the estate in fee simple vested in any man in his naturall capacity, but in case where the donor or feoffor reserveth to him a tenure, and then the law doth imply a condition in law by way of escheat. Also (as hath beene said) no writ of escheat lyeth but in the three cases aforesaid, and not where a body politique or incorporate is dissolved.

\* Sect. 147.  
149. 248. 299.  
417. 607. &c.  
(2. Ro. Abs.  
816.)

[5] 7 E. 4. 11.  
12. Fitz. N. B.  
33. 9 E. 3. 26.  
17 E. 1. stat. de  
templaria.

## Sect. 5.

**I**TEM, *si soient trois freres, et le mulnes frere purchase terres en fee simple, et devie sauns issue, l'eigne frere avera la terre per descent, et nemy le puisne, &c. Et auxi si soient trois freres, et le puisne purchase terres en fee simple, et devie sans issue, l'eigne frere avera la terre per descent et nemy le mulnes, pur ceo que l'eigne est plus digne de sanke.*

**A**LSO, if there be three brethren, and the middle brother purchaseth lands in fee simple, and die without issue, the elder brother shall have the land by descent, and not the younger (8), &c. And also if there be three brethren, and the youngest purchase lands in fee simple, and die without issue, the eldest brother shall have the land by descent and not the middle, for that the eldest is most worthy of blood.

**N**OW commeth our author to the descent betweene brethren, which he purposely omitted before. *Descent, descensus*, commeth of the Latine word *descendo*; and, in the legall sense, it signifyeth, when lands do by right of blood fall unto any after the death of his ancestors: or a descent is a meanes whereby one doth derive him title to certain lands, as heire to some of his ancestors. And of this, and of that which hath been spoken doth arise another division of estates in fee simple, viz. every man, that hath

(Post. 37.)

(2) [See N. 71.]

(3) [See N. 72.]

hath a lawful estate in fee simple, hath it either by descent, or by purchase.

"*L'eigne est plus digne de sanke.*" It is a maxime in law, that the next of the worthiest blood shall ever inherit, [14. a.] as the male and all descendants from him before the female, and the female of the part of the father before the male or female of the part of the mother, &c. because the female of the part of the father is of the worthiest blood. [c] And therefore among the males the eldest brother and his posterity shall inherit lands in fee simple as heire before any younger brother, or any descending from him, because (as *Littleton* saith) he is *plus digne de sanke. Quod prius est dignius est*, and *qui prior est tempore potior est jure. Si quis plures filios habuerit, jus proprietatis primò descendit ad primogenitum, eò quòd invectus est primò in rerum naturà.* In king *Alfred's* time knights fees (1) descended to the eldest sonne, for that by division of them between males the defence of the realme might be weakened; but in those days socage fee was divided between the heires males; and therewith agreeth *Glanvill.* \* *Cùm quis hereditatem habens moriatur, &c. si plures reliquerit filios, tunc distinguitur utrùm ille fuerit miles, sive per feodum militare tenens, aut liber sockmannus, quia si miles fuerit aut per militiam tenens, tunc secundum jus regni Angliæ primogenitus filius patri succedit in toto, &c. si verò fuerit liber sockmannus, tunc quidem dividetur hereditas inter omnes filios, &c.* (2). But hereof more shall be said hereafter in his proper place.

[c] *Britton* cap. 119. *Bract.* lib. 2. cap. 36. 277. 279. 3 E. 3. 60. 3 *Kilz.* *Dyer* 139. *Stanford* preer. 52. 58. 3 E. 1. tit. *Avowry.* 235. 32 E. 3. descent. 80. *Bra.* lib. 4. 211. *Fleta* lib. 6. ca. 2. *Glanvill.* lib. 7. ca. 1. *Mirror* cap. 1. sect. 3. \* *Glanvill.* lib. 7. cap. 3. & ca. 1. *Vid.* *Pl. Com.* 239. b.

## Sect. 6.

**I**TEM, est aascavoir, que nul avera terre de fee simple per discent come heire a aucun home, si non que il soit son heire d'entire sanke. Car si home ad issue deux firs per divers venters, et l'eigne purchase terres en fee simple, et morust sans issue, le puisne frere n'avera la terre, mes l'uncle l'eigne frere, ou auter son procheine cosin ceo avera, pur ceo que le puisne frere est de demy sanke al eigne frere.

**A**LSO, it is to be understood, that none shall have land of fee simple by descent as heire to any man, unlesse he be his heire of the whole blood. For if a man hath issue two sonnes by divers venters, and the elder purchase lands in fee simple, and dye without issue, the younger brother shall not have the land, but the uncle of the elder brother, or some other his next cosin shall have the same, because the younger brother is but of halfe blood to the elder (5).

**N**O man can be heire to a fee simple by the common law, [d] but he that hath *sanguinem duplicatum*, the whole blood, that is, both of the father and of the mother, so as the halfe blood

[d] *Bract.* lib. 4. *John.* lib. 2. 65. *Britton* ca. 119. *Fleta* lib. 6. ca. 1. 1 E. 3. 19. *John Gifford's case.* 31 E. 3. *Conterpl. de voucher* 88. 40. *Ass.* 6. 4 E. 2. *Formal.* 49. *Vid.* *Ratcliff's case.* 3. Co. 40. 41.

(1) Here lord Coke writes, as taking it for granted, that feudal tenures subsisted in England before the Conquest. But this is a controverted point amongst our best

writers. See post. 64. a. where a note is given on this subject.

(2) [See N. 73.]

(5) [See N. 75.]

blood is no blood inheritable by descent; (3) because that he that is but of the halfe blood cannot be a compleat heire, for that he hath not the whole and compleate blood (4), and the law in descents in fee simple doth respect that which is compleat and perfect. And this maxime doth not onely hold where lands (whereof *Littleton* here speaketh) are claymed or demanded as heire, [c] but also in case of appeale of death: for if one brother be slaine, the other brother of the halfe blood shall never have an appeale (albeit he shall recover nothing therein either in the realtie or personaltie) because in the eye of the law he is not heire to him. Also this rule extends to a warranty, as our author himselfe elsewhere holdeth (6).

(1. Re. Abr. 292.)

[c] 7 E. 2. 12.

Sect. 77.

## Sect. 7.

**ET** si home ad issue fits et file per un venter, et fits per auter venter, et le fits del primer venter purchase terres en fee, et morust sans issue, la soer avera la terre per discent, come heire a sa frere (1), et nemy le puisne frere, pur ceo que la soer est de le entree sanke a son cigne frere.

**AND** if a man hath issue a sonne and a daughter by one venter, and a son by another venter, and the son of the first venter purchase lands in fee and die without issue, the sister shall have the land by descent, as heire to her brother, and not the younger brother, for that the sister is of the whole blood of her elder brother.

**THIS** is put for an example to illustrate that which hath been said, and needeth no explanation. And herewith agreeth [14. b.] *Britton*.

Britton cap. 119.

## Sect. 8.

**ET** aussi, ou home est seisie de terres en fee simple, et ad issue fits et file per un venter, et fits per auter venter, et morust, et l'eigne fits enter et morust sans issue, la file avera les tenements, et nemy le puisne fits, uncore le puisne fits est heire a le pere, mes nemy a son frere. Mes si l'eigne fits ne entra en la terre apres la mort son pere, mes morust devant aucun entre fait per luy, donques le puisne frere poit entrer, et avera le terre come heire a son pere. Mes lou l'eigne

**AND** also, where a man is seised of lands in fee simple, and hath issue a sonne and daughter by one venter, and a son by another venter, and die, and the eldest son enter, and die without issue, the daughter shall have the land, and not the younger son, yet the younger son is heire to the father, but not to his brother. But if the elder son doth not enter into the land after the death of his father, but die before any entry made by him, then the

(3) [See N. 74.]

(6) [See N. 76.]

(4) See what is observed on lord Coke's explanation of the meaning of the term *whole blood*, in 1 Sid. 200. See too 1 Vent. 424. and 2 P. Wms. 667.

[14. b.]

(1) a sa frere, omitted in L. and M. and Roll.

*l'eigne fts en le case avant dit entra apres la mort son pere, et ad ent possession, donques la soer atera la terre, quia possessio fratris de feodo simplici facit sororem esse heredem. Mes si sont deux freres per divers venters, et l'eigne est scisie de terre en fee, et morust sans issue, [et son uncle entra come prochein heire a luy quel auxy morust sans issue, (1)] ore le puisne frere puit ater la terre come heire al uncle, pur ceo que il est de l'entier sanke a luy, coment que il soit de demy sanke a son cigne frere.*

the younger brother may enter, and shall have the land as heire to his father. But where the elder son in the case aforesaid enters after the death of his father, and hath possession there the sister shall have the land, because *possessio fratris de feodo simplici facit sororem esse heredem*. But if there be 2 brothers by divers venters, and the elder is seised of land in fee, and die without issue, and his uncle enter as next heire to him, who also dies without issue, now the younger brother may have the land as heire to the uncle, for that he is of the whole blood to him, albeit he be but of the halfe blood to his elder brother.

[f] 24 E. 3. 24.  
30. 31 E. 3.  
Count. de  
Vouch. 88.  
33 E. 3. tit.  
Vouch. 88.  
37. Ass. p. 4.  
40 E. 3. 9.  
43 E. 3. 10.  
39 E. 3. fol. 13.  
7 H. 1. 3.  
(1. Ro. Abr.  
627.)  
(Cro. Cha. 411.  
Post. 281.)  
(3. Co. 40, 41.)

[g] 5 E. 4.  
10. 7. Pl. Com. fo.  
58. in Wimbiabe's  
case.

[h] 10. Ass. 27.  
34. Ass. 10.  
31 E. 3.  
Count de  
Vouch. 88.  
38 E. 3. tit.  
Vouch. 94.

[i] 11 H. 4. 11.  
40 E. 3. 30.  
43 E. 3. 13.  
40. Ass. p. 6.  
Ratcliff's case,  
3. Co. 41.

“**SEISIE** de terres en fee simple.” These words exclude a seisin in fee taile, albeit he hath a fee simple expectant. [f] (2) And therefore if lands be given to a man and his wife, and to the heires of their two bodies, the remainder to the heires of the husband, and they have issue a sonne, and the wife dyeth, and he taketh another wife, and hath issue a sonne, the father dieth, the eldest son entreth, and dieth without issue, the second brother of the halfe blood shall inherit; because the eldest sonne by his entry was not actually seised of the fee simple, being expectant but onely of the estate taile (3). And the rule is, that *possessio fratris de feodo simplici facit sororem esse heredem*, and here the eldest son is not possessed of the fee simple but of the estate taile (4). And where *Littleton* speaketh onely of lands, [g] yet there shall be *possessio fratris* of an use (5), of a seigniorie, a rent, an advowson (6) and of other hereditaments.

“**Et l'eigne fts enter.**” [h] These words are materially added when the father dies seised of lands in fee simple, for if the eldest son doth not in that case enter, then without question the youngest sonne shall be heire, because as it has beene said before regularly he must make himselfe heire to him that was last [15. a.] actually seised (or to the purhaser), and that was to the father where the eldest sonne did not enter. And therefore *Littleton* addeth, that the sonne is heire to the father. [i] But when the eldest sonne in this case doth enter, then cannot the youngest sonne being of the halfe blood be heire to the eldest, but the land shall descend to the sister of the whole blood. Yet in many cases albeit the sonne doth not enter into lands descended in fee simple, the sister of the whole blood shall inherit,

(1) All between the brackets omitted in Roh. edit.

(2) 7 H. 4. 16. Vid. 38. Ass. 8. Hal. MISS.

(3) Acc. Bro. Abr. Discent, pl. 13, 14. and 30. Scie Facias, pl. 126. and Execu-

tion 67. 1. Ro. Abr. 628. and see 1. Show. 245. and 3. Mod. 257.

(4) [See N. 77.]

(5) [See N. 78.]

(6) [See N. 79.]



inherit, and in some cases where the eldest sonne doth enter, yet the younger brother of the halfe blood shall be heire.

[k] If the father maketh a lease for yeares, and the lessee entreth and dieth, the eldest sonne dieth during the tearme before entry or receipt of rent, the younger sonne of the halfe blood shall not inherite, but the sister (2); because the possession of the lessee for yeares is the possession of the eldest sonne, so as he is actually seised of the fee simple, and consequently the sister of the whole blood is to be heire (3). The same law it is if the lands be holden by knights service, and the eldest sonne is within age, and the gardian entreth into the lands. And so it is if the gardian in socage enter (4).

But in the case aforesaid, if the father make a lease for life or a gift in taile, and dyeth, and the eldest sonne dyeth in the life of tenant for life or tenant in taile, the younger brother of the halfe blood shall inherit; because the tenant for life or tenant in taile is seised of the freehold, and the eldest sonne had nothing but a reversion expectant upon that freehold or estate taile, and therefore the youngest sonne shall inherit the land as heire to his father, who was last seised of the actual freehold. And albeit a rent had beene reserved upon the lease for life, and the eldest sonne had received the rent and dyed, yet it is holden by some\* that the younger brother shall inherite, because the seisin of the rent is no actual seisin of the freehold of the land. But 35. *Ass. pl.* 2. seemeth to the contrary, because the rent issueth out of the land and is in lieu thereof (5), wherein the onely question is, whether such a seisin of the rent be such an actual seisin of the land in the eldest son as the sister may in a writ of right make herselfe heire of this land to her brother. But it is cleere, that [l] if there be bastard *cigne* and *mulier putone*, and the father maketh a lease for life or a gift in taile reserving a rent and die, and the bastard receive the rent and dye, this shall barre the *mulier*, for the reason of that standeth upon another maxime, as shall manifestly appeare in his apt place, Sect. 399.

"*Seisin des terres.*" [m] (6) But in this case, if the eldest sonne doth enter and get an actual possession of the fee simple, yet if the wife of the father be indowed of the third part and the eldest sonne dyeth, the younger brother shall have the reversion of this third part notwithstanding the elder brother's entry; because that his actual seisin which he got thereby was by the endowment defeated (7). But if the eldest sonne had made a lease for life, and the lessee had endowed the wife of the father, and tenant in dower had died, the daughter should have had the reversion, because the reversion was changed and altered by the lease for life, and the reversion is now expectant on a new estate for life.

"*Enter.*" Hereupon the question groweth, whether if the father be seised of divers severall parcels of land in one county, and after the death of the father the sonne entreth into one parcell generally, and before any actual entry into the other dyeth, this generall entry

[k] 5 E. 4. 7. b.  
3 H. 7. 5.  
8. Ass. p. 6.  
45 E. 3. tit.  
Release 28.  
(Post. 243.  
Mo. 125.  
3. Co. 48. 41.)

(Post. 191.)

\* 7 H. 8. 34.  
per Halls &  
Logdington.  
35. Ass. p. 2.

[l] 14 E. 2.  
Bastard 26. Vid.  
Sect. 399.

(Post. 344. a.)

[m] 7 H. 5. 2, 3, 4.

(3. Co. 35. b.  
Post. 191. b.  
4. Co. 58. b.)

(2) [See Note 80.]

(3) [See Note 81.]

(4) [See Note 82.]

(5) [See Note 83.]

(6) See post. 31. a.

(7) [See Note 84.]

entry into part shall vest in him an actual seisin in the whole, so as the sister shall inherit the whole. And this is a *quare* in 21 H. 7. 33. a. (8.)

21 H. 7. 33. a.

And some doe take a diversitie when an entry shall vest, or [15. b.] devest an estate, that there must be several entries into the several parcels, but where the possession is in no man, but the freehold in law is in the heir that entreth, there the generall entry into one part reduceth all into his actual possession. And therefore if the lord entreth into a parcel generally for a mortmain, or the feoffor for a condition broken, or the disseisee into a parcell generally, the entry shall not vest nor devest in these or like cases, but for that parcell. But when a man dies seised of divers parcels in possession, and the freehold in law is by the law cast upon the heire, and the possession in no man, there the entry into parcell generally seemeth to vest the actual possession in him in the whole. But if his entry in that case be speciall, viz. that he enter only into that parcell and into no more, there it reduceth that parcell only into actual possession.

(Post. 284. b.)

(1. Leon. 264.)

"*Homo seise des terres.*" What then is the law of a rent, advowson, or such things that lie in grant? [g] If a rent, or an advowson, do descend to the eldest sonne, and he dyeth before he hath seisin of the rent, or present to the church, the rent or advowson (1) shall descend to the youngest sonne, for that he must make himselfe heire to his father, as hath been oftentime said before. The like law is of offices, courts, liberties, franchises, commons of inheritance, and such like. [h] And this case differeth from the case of the tenant by the courtesie, for there if the wife dieth before the rent day, or that the church become voyd, because there was no laches or default in him, nor possibility to get seisin, the law in respect of the issue begotten by him will give him an estate by the courtesie of *England*. But the case of the descent to the yongest sonne standeth upon another reason, viz. to make himselfe heire to him that was last actually seised, as hath beene said.

[g] 19 E. 2.  
civ. bar. 203.  
177. 3 H. 7. 5.

[h] 7 E. 3. 66.  
3 H. 7. 5.  
(Post. 29. a.)

"*En fee simple.*" [i] For halfe blood is not respected in estates in taile, because that the issues doe claime in by descent, *per formam doni*, and the issue in taile is ever of the whole blood to the donee (2).

[i] 8 E. 3. 11.  
49 E. 3. 12.  
Ratcliffe's case.  
3 Co. 41.

[k] Bracton lib.  
2. fo. 65. & lib.  
4. fo. 379.  
Britton cap. 119.  
Flet. B. 6. c. 1.  
24 E. 3. 30.

[l] Ratcliffe's  
case. 3. Co. 42.  
[m] Bracton cap.  
119.

"[k] *Possessio fratris de feodo simplici facit sororem esse heredem.*" Hereupon foure things are to be observed, every word almost being operative, and materiall. First, that the brother must be in actual possession; for *possessio est quasi pedis positio*. Secondly, *de feodo simplici* exclude estates in taile. Thirdly, *facit sororem esse heredem*. So as [l] *soror est heres facta*, and therefore some act must be done to make her heire, and the yonger sonne is *heres natus* [m] if no act be done to the contrary. And albeit the words be *facit sororem esse heredem*, yet this doth extend to the issue of the sister, &c. who shall inherit before the yonger brother. Fourthly, Of *dignities*, whereof no other possession can be had but such as descend (as

(8) *Adjudged accordingly in the point P.*  
4 Eliz. B. R. Hal. MSS.

(1) [See Note 85.]

(2) 8 E. 3. 11. 12 E. 4. 19. 49 E. 3. 12  
4 E. 2. Formedon 49. Hal. MSS.

(as to be a duke, marquesse, earl, viscount, or baron) to a man and his heires, there can be no possession of the brother to make the sister inherit (3), but the yonger brother, being heire (as *Littleton* saith) to the father, shall inherit the dignitie inherent to the blood, as heire to him that was first created noble.

(Cre. Cha. 601.)

And you shall understand that concerning descents there is a law, parcell of the lawes of *England*, called *jus corona*, and differeth in many things from the generall law concerning the subject. As for example, the king in any suit for any thing that pertaines to the crowne shall not shew in certaine his cosinage as a subject shall do, or as he himselfe shall do for things touching his dutchie. [n] And in the case of the king, if he hath issue a sonne and a daughter by one venter, and a sonne by another venter, and purchaseth lands and dieth, and the eldest son enter and dieth without issue, the daughter shall not inherit these lands, nor any other fee simple lands of the crowne, but the yonger brother shall have them. Wherein note that neither *possessio fratris* doth hold of lands of the possessions of the crowne, nor halfe blood is no impediment to the descent of the lands of the crowne, as it fell out in experience after the decease of king *Edward* the sixth to the queene *Mary*, and from queene *Mary* to queene *Elizabeth*, both which were of the halfe blood, and yet inherited not onely the lands which king *Edward* or queen *Mary* purchased, but the ancient lands parcell of the crowne also.

6 H. 4. 1.

[n] 34 H. 6.  
fol. 34. Pl. Com.  
fo. 246. 25 E. 3.  
ca. de natis ultra  
mare.  
(4 Inst. 205.)

A man, that is king by descent of the part of his mother, purchases land to him and his heires, and dies without issue, this land shall descend to the heire of the part of the mother; but in the case of a subject, the heire of the part of the father shall have them.

Pl. Com. ubi  
supra.

So king *Henry* the eight purchased lands to him and his heires, and died having issue two daughters, the lady *Mary*, and the lady *Elizabeth*; after the decease of king *Edward*, the eldest daughter queen *Mary* did inherit only all his lands in fee simple. For the eldest daughter or sister of a king shall inherit all his fee simple lands. So it is if the king purchaseth lands of the custome of gavelkind, and die having issue divers somes, the eldest sonne shall only inherit these lands (4). And the reason of all these cases is, for that the qualitie of the person doth in these and many other like cases alter the descent, so as all the lands and possessions whereof the king is seised *in jure corona*, shall *secundum jus corona* attend upon and follow the crowne, and therefore to whomsoever the crowne descend, those lands and possessions descend also, for the crowne and

(7. Co. 12. b.  
Calvin's case.)

[16. a.] the lands whereof the king is seised *in jure corona*, are *concomitantia*. If the right heire of the crowne be attainted of treason, yet shall the crowne descend to him, and *eo instante* (without any other reversall) the attainder is utterly avoided, as it fell out in the case of *Henry* the seventh (1). [o] And if the king purchase lands to him and his heires, he is seised thereof *in jure corona*; *à fortiori*, when he purchases land to him his heires and successors (2).

Pl. Com. fol.  
247.  
(1. Sid. 128.  
Pl. Com. 338.  
1 H. 7. fol. 4.  
(Plowd. 106.  
244, 245.)

[o] 43 E. 3.  
fol. 20.

But hereof this little taste shall suffice.

[16. a.]

(3) [See Note 86.]

(1) [See Note 89.]

(4) [See Note 37.]

(2) [See Note 89.]

## Sect. 9.

**ET** est asçavoir, que ce parol (enheritance) n'est pas tantsolement eniendue lou home ad terres ou tenements per descent d'enheritage, mes auxi chescun fec simple ou taile (3) que home ad per son purchase puit estre dit enheritance, pur ceo que ses heyres luy purront enheriter. Car en brieve de droit que home portera de terre que fuit de son purchase demesne, le brieve dirra, *quam clamat esse jus et hæreditatem suam*. Et issint serra dit en divers autres briefs queux home ou feme portea de son purchase demesne, come apiert per le Regist.

**AND** it is to wit, that this word (*inheritance*) is not onely intended where a man hath lands or tenements by descent of inheritance, but also every fee simple or taile which a man hath by his purchase may be said an inheritance, because his heires may inherit him. For in a writ of right which a man bringeth of land that was of his owne purchase, the writ shall say, *quam clamat esse jus et hæreditatem suam*. And so shall it be said in divers other writs which a man or woman bringeth of his owne purchase, as appeares by the Register.

Sect. 45, 46, 57.  
80, 80, 100.  
145, 164, 170.  
174, 229, 243.  
244, 274, 280.  
273, 300, 308.  
419, 420, 412.  
489, 632, 607,  
749.

“**ET** est asçavoir.” This kinde of speech is used twice in this Chapter, and oftentimes by our author in all his three bookes, and ever teacheth us some rule of law, or generall or sure leading point, as you shall perceive by reading, and observing of the same, which for the case of the studious reader I have observed.

[a] Sect. 738.  
Bract. lib. 2.  
fo. 62. b. Fleta,  
lib. 6, cap. 1.  
(post. 383. b.)

“*Quam clamat esse jus et hæreditatem suam*.” [a] Here our author declareth the right signification of this word (*inheritance*.) And true it is that in the writ of right patent, &c. *quando dominus remittit curiam suam*, the words of the writ, be, *quam clamat esse jus et hæreditatem suam*. And in the *precipe in capite*, in a *cui in vitâ*, [b] when the defendant claimeth by purchase, the writ is, *quam clamat esse jus et hæreditatem suam*. And with *Littleton* agreeth the Register, fol. 4. & 232. and the booke in 49 E. 3. 22, against sodaine opinions 7 H. 4. 5. 10 H. 6. 9. 39 H. 6. 38. Pl. Com. *Wimbeshes*'s case 47. And yet in 7 H. 4. 5. which is the booke of the greatest weight, sir *William Thirning* chiefe justice of the common bench (as it seemeth doubting of it) went into the chancery to enquire of the chancery men the forme of the writ in that case; and they said that the forme was both the one way and the other, so as thereby the opinion of *Littleton* is confirmed, and the booke in 6 E. 3. fo. 30, is notable; for there in an action of waste the plaintife supposed, that the defendant did hold *de hæreditate suâ*, and it is ruled, that albeit the plaintife, purchased the reversion, yet the writ should serve. And there it is said, it hath beene seene, that in a *cui in vitâ*, the writ was, *which the demandant claimed as her right and inheritance*, when it was her purchase. And so this point wherein there might seem some contrariety in bookes

[a] Regist.  
lib. 1.  
fo. 10. b. 123.  
fo. 10. b. 4.  
fo. 10. b. 3. 23.  
5.  
H. 6. 38.  
E. 3. 30. Pl.  
Long. Wimbeshes's case, 47.  
fo. 38. b.

6 H. 3. 30.

is

is manifestly cleared. But in the statute of W. 2. cap. 5. *de hereditate uxorum* by construction of the whole statute is taken onely for the wives inheritance by descent, and not by purchase, as appeareth in 1 E. 2. tit. *Quare impedit*. 43. 35 H. 6. 54. F. N. B. 34. b.

There be some that have an inheritance [c], and have it neither by descent, not properly by purchase, but by creation; as when the king doth create any man a duke, a marquesse, earle, viscount, or baron to him and his heires, or to the heires males of his bodie, &c. he hath an inheritance therein by creation. A man may have an inheritance in title of nobilitie and dignitie three manner of

[16. b.] wayes; that is to say, by creation, by descent, and by prescription (1). By creation two manner of ordinary wayes (for I will not speak of a creation by parliament) by writ, and by letters patent. Creation by writ is the ancient way; and here it is to be observed, that a man shall gain an inheritance by writ (2). King Richard the second created John Beauchampe de Holte baron of Kederminster by his letters patents, bearing date the 10th October, anno regni sui 11, before whom there was never any baron created by letters patent, but by writ. And it is to be observed, that if he be generally called by writ to the parliament, he hath a fee simple in the baronie without any words of inheritance. But if he be created by letters patent, the state of inheritance must be limited by apt words, or else the grant is void. If a man be called by writ to the parliament, and the writ is delivered unto him, and he dieth before he cometh and sits in parliament, whether he was a baron or no? And it is to be answered that he was no baron, for the direction and deliverie of the writ to him maketh not him noble; for the better understanding whereof it is to be knowne that the words of the writ in that case are, *Re.x, &c. E. B. de D. Chivalier salutem. Quia de advisamento et assensu concilii nostri, pro quibusdam arduis et urgentibus negotiis statum et defensionem regni nostri Anglie, &c. concernentibus, quoddam parlamentum nostrum apud civitatem Westm. à 21 Octob. proxim. futuro tenere ordinavimus, et ibid. vobiscum et cum fratribus, magnatibus et proceribus dicti regni nostri colloquium habere et tractatum, vobis in fide et ligeancia quibus nobis tenemini firmiter injungendo mandamus, quod consideratis dictorum negotiorum arduitate et periculis imminetibus, cessante excusatione quacunque, dictis die et loco personaliter interitis nobiscum et cum fratribus, magnatibus, et proceribus supradictis, super dictis negotiis tractatur vestrumque consilium impensur, &c.* And this writ hath no operation or effect until he sit in parliament, and thereby his blood is ennobled to him and his heires lineall, and thereupon a baron is called a peer of parliament. [d] And if issue be joined in any action, whether he be a baron, &c. or no, it shall not be tryed by jury, but by the record of parliament, which could not appeare unlesse he were of the parliament (3). Therefore a duke, earle, &c. of another kingdome, are not to be sued by those names here. for that they are not peeres of our parliament (4). And albeit

W. 2. ca. 5.  
1 E. 2. tit.  
quare imp. 43.  
35 H. 6. 54.  
F. N. B. 34. b.

[c] 4. Co. 52, 53.  
Countess of  
Rutland's case.  
8. Co. 16, 17.  
the Prince's case,  
(4. Inst. 120.)

(13. Co. 69.  
and 9. b.)

6. Co. 52, 53.  
Countess of  
Rutland's case,  
8 H. 6. 10.  
8 H. 6. 30.  
35 H. 6. 46.  
Pl. Com. 223.  
[d] 35 H. 6. 46.  
48 E. 3. 30. b.  
48. Ass. p. 6.  
22. Ass. p. 24.  
Regist. 287.  
11 E. 3. breve  
472. 20. E. 4. 6.

... where the earl-

... is mentioned as an in-

... earldom by prescription. In

... Note 90.]

(3) [See Note 91.]

this case many curious particulars concerning the honour of Petworth are mentioned.

(4) [See Note 92.]

(B. Co. 82.  
Countess of Rut-  
land's case.)

[c] 6. Co. 82. 83.  
Countess of Rut-  
land's case.  
3 H. 6. 11.  
22. An. 24.  
12. E. 3. 13.  
244. 8 H. 4. 19.  
11 M. 4. 15.  
Vid. Fleta lib. 6.  
ca. 10.  
[f] 4. Co. 118.  
Acton's case. 8.  
tempore Marie  
Regine. Brooke  
nomine de dig-  
nity 69.  
14 H. 6. 18.  
3 H. 6. 11.  
[g] 23 H. 6. 52.

[A] D. Co. 97.  
98. Sir George  
Meynell's case.

File Sect. 88.  
94. 96. 101. 127.  
234. 318. 383.  
412. 480. 433.  
514. 643. 644.  
637. 660. 692.  
709. 759.

albeit the creation by writ is the ancienter, yet the creation by letters patent is the surer, for he may be sufficiently created by letters patent, and made noble, albeit he never sit in parliament.

[c] And it is to be observed, that nobilitie may be granted for term of life, by act in law without any actuall creation; as if a duke take a wife, by the intermarriage she is a duchess in law, and so of a marchesse, an earle, and the rest, and in some other cases. And there is a diversitie betwene a woman that is noble by descent, and a woman that is noble by marriage. [f] For if a woman, that is noble by descent, marrie one that is under the degree of nobilitie, yet she remaineth noble still (5); but if she gaine it by marriage, she loseth it if she marry under the degree of nobilitie; and so is the rule to be understood, *Si mulier nobilis nupsierit ignobili desinit esse nobilis*. [g] But if a duchesse by marriage marrieth a baron of the realme, she remaineth a dutchesse and loseth not her name, because her husband is noble (6), *et sic de ceteris*.

And as an estate for life may be gained by marriage, so may the king create either man or woman noble for (7) life [A] but not for yeares, because then it might goe to executors or administrators (8). The true division of persons is, that everie man is either of nobilitie that is, a lord of parliament of the upper house, or under the degree of nobilitie, amongst the commons, as knights, esquires, citizens and burgesses of the lower house of parliament, commonly called the house of commons; and he that is not of the nobilitie is by intendment of law among the commons (9).

"*Come appartient per le Register.*" Which booke in the statute of W. 2. ca. 24. is called *Registrum de cancellaria*, because it containeth the formes of writs at the common law that issue out of the chancery, *tanquam ex officina justitie*. There is a register of originall writs, and a register of judiciall writs; but when it is spoken generally of the register, it is meant of the register originall. For the antiquitie and excellencie of this booke, see in my preface to the eighth part of my Commentaries. This excellent booke our author voucheth divers times in these bookes, and so doth he divers other authorities in law of several kinds, but with this observation, that he citeth no authoritie but when the case is rare, or may seeme doubtfull, which appeareth in this, that he putteth no case in all his three bookes but hath warrant of good authoritie in law. For he knew well the rule, that *peraphrica vera non sunt probanda*. And the like observation is made of Justice Fitzherbert in his booke of *natura brevium*, that he never citeth authoritie, but when the case is rare or was doubtfull to him. The authorities which our author hath cited in his three bookes I have collected.

(5) See 14 H. 8. 42. Dy. 79.

(6) [See Note 93.]

(7) [See Note 94.]

(8) [See Note 95.]

(9) See 2. Inst. 29. 50.

## Sect. 10.

[17.a.] **ET** de tiels choses, de *quelque homme peut avoir un manuel occupation, possession ou receipt, sicome des terres tenements rents et hujusmodi, la home dirra en count countant et en plee pledant, que un tiel fuit seisie en son demesne come de fee. Mes de tiels choses, que ne gisent en tiel manuel occupation, &c. sicome de advowson d'esglise et hujusmodi, la il dirra, que il fuit seisie come de fee, et nemy en son demesne come de fee. Et en Latin il est en l'un cas, quòd talis seisitus fuit, &c. in dominico suo ut de feodo, et en l'auter case, quòd talis seisitus fuit, &c. ut de feodo.*

**A**ND of such things, whereof a man may have a manuell occupation, possession or receipt, as of lands, tenements rents, and such like, there a man shall say in his count countant and plea pleadant, that such a one was seised in his demesne as of fee. But of such things, which do not lie in such manuell occupation, &c. as of an advowson of a church and such like, there he shall say, that he was seised as of fee, and not in his demesne as of fee. And in Latine it is in one case, *quòd talis seisitus fuit in dominico suo ut de feodo*, and in the other case, *quòd talis seisitus fuit, &c. ut de feodo*.

**"En count countant."** Count, i.e. *narratio*, cometh of the French word *conte*, which in *Latyne* is *narratio*, and is vulgarly called a declaration (1). The original writ is according to its name *breve*, brieve and short; but the count, which the plaintife or demandant makes, is more narrative and spacious and certaine both in matter and in circumstances of time and place, to the end the defendant may be compelled to make a more direct answer; so as the writ may be compared to *logicke*, and the count to *rheticke*: and it is that which the civilians call a *libell*. And in that ancient booke of the Mirror of Justices, lib. 2. cap. des loiers, *countors* are *serjeants* skilfull in law, so named of the count as of the principal part, and in *W. 2. ca. 29.* he is called *serjeant counter* (2).

(Doct. Pla. 53.)

**"En plee pledant."** *Placitum*. Here Littleton teacheth good pleading in this point, of which in his Third Booke and Chapter of Confirmation, Sect. 534. he thus saith, *Et saches mon fite, que est un des plus honorables laudables et profitables choses en nostre ley, de avoir le science du bien pleder en actions reals et personels; et sur ceo, jeo toy counsaile especielment de mettre ton courage et cure de ceo apprendre.* And for this cause this word *placitum* is derived à *placendo*, *quia bene placitare super omnia placet*; and it is not, as some have said, so called *per antiphrasin*, *quia non placet*.

Mirror des  
Justices.  
W. 2. cap. 29.

(Post. 303.)

**"Seisie,"** *Seisitus*, cometh of the French word *seisin*, i.e. *possessio*, saving that in the common law, *seised* or *seisin* is properly applied to freehold, and *possessed* or *possession* properly to goods and chattels; although sometime the one is used instead of the other.

Bract. lib. 4.  
fol. 263. Idem  
lib. 5. fol. 372.  
Britton fol. 28.  
306.  
Flet. lib. 2. c. 8.  
Stanf. Prer. 6.  
Pl. Com. lib. 121.  
Wroteley's  
case.

*En son demesne come de fee, in dominico suo ut in feodo.* *Domum* is not onely that inheritance, wherein a man hath proper dominion

(1) [See Note 96.]

(2) [See Note 97.]

dominion or ownership, as it is distinguished from the lands which another doth hold of him in service, but that which is manually occupied, manured and possessed, for the necessary sustentation, maintenance, and supportation of the lord and his household, and savoureth *de domo*, of the house, either *ad mensam*, for his or their board or sustentation, or is manually received, (as rents) for bearing and defraying of necessary charges publike or private. Of these, saith our author, he should plead, that he is seised *in dominico suo ut de feodo*, i. e. *de feodo dominicali, seu terrâ dominicali, seu redditu dominicali*; which is as much as to say demeyne or demaine, of the hand, i. e. manured by the hand, or received by the hand; and therefore he calleth it manuall occupation, possession or receipt (3). And in *Domesday* demeane land is called inland; as for example, *4 bovatas terræ de inland, et 10 bovatas in servitio*.

*Domesday.*

"*En tiel manuel occupation, &c.*" There is nothing in our author but is worthy of observation. Here is the first (*&c.*) and there is no (*&c.*) in all his three bookes (there being as [17.b.] you shall perceive very many), but it is for two purposes. First, it doth imply some other necessary matter. Secondly, that the student may, together with that which our author hath said, inquire what authorities there be in law that treat of that matter, which will worke three notable effects: first, it will make him understand our author the better: secondly, it will exceedingly adde to the reader's invention: and lastly, it will fasten the matter more surely in his memory; for which purpose I have for his ease in the beginning set downe, in these Institutes, the effect of some of the principal authorities in law as I conceive them concerning the same. In this place the (*&c.*) implyeth possession or receipt, and such other matter as appeareth by my notes in this Section. As for the authorities of law, you shall find the effect of them in this Section and the like of the rest of the (*&c.*) which you shall find in the Sections hereafter mentioned, omitting those (for avoyding of tediousnesse) that either are apparent, or which are explained in some other places, viz. Sect. 20. 48. 103. 108. 120. 125. 136. 137. 146. 149. 154. 164. 166, 167, 168. 177. 179. 183, 184. 194. 200. 202. 210, 211. 217. 220. 226. 233. 240. 242. 244, 245. 248. 262. 264. 269, 270, 271. 279. 320. 322, 323. 325, 326, 327. 329, 330. 335, 336. 341. 347, 348, 349, 350. 352. 355, 356. 359. 364, 365. 374, 375. 377. 381. 384. 389. 393. 395. 397. 399. 401. 402, 410. 417. 428. 433. 447. 449. 464. 470, 471. 477. 483. 489. 500, 501. 522. 532. 552. 553. 556. 558. 562. 578. 591, 592, 593, 594. 603. 613. 624, 625. 630. 632, 634. 637, 638. 648. 659, 660, 661. 669. 687. 693. 700. 718. 745. 748, 749. All which I have observed and quoted here once for all, for the ease of the studious reader (1).

"*Ut de feodo.*" Where (*ut*) is not by way of similitude, but to be understood positively that he is seised in fee. And so it is where one pleads a descent to one *ut filio et heredi*, that is, to

*Io-*

*Britt. 205 206.  
optm. Ficta.  
lib. 6 cap. 5.  
Idem. lib. 3.  
cap. 15.*

(3) [See Note 98.]

(1) Sec in fol. 22. a. the note in respect

to lord Coke's observation on Littleton's use of *nota, &c.* and like expressions.



*Jo. S.* that is sonne and heyre, *et sic de ceteris*, where (*ut*) *denotat ipsam veritatem*.

“*Sicome de advowson.*” Of an advowson [*i*] wherein a man hath as absolute ownership and propertie as he hath in lands or rents, yet he shall not pleade that he is seised in *dominico suo ut de feodo* (2), because that inheritance, favouring not *de domo*, cannot either serve for the sustentation of him and his household, nor any thing can be received for the same for defraying of charges. And therefore he cannot say, that he is seised thereof in *dominico suo de feodo*, whereby it appeareth how the common law doth detest simony and all corrupt bargaines for presentations to any benefice, but that [*k*] *idonea persona* for the discharge of the cure should be presented freely without expectation of any thing: nay, so cautious is the common law in this point, that the pl. in a *quare impedit* should recover no damages for the losse of his presentation untill the statute of *W. 2. cap. 5.* (3) And that is the reason that guardian in socage [*l*] shall not present to an advowson, because he can take nothing for it, and by consequent he cannot account for it. And by the law he can meddle with nothing that he cannot account for. [*m*] And in a writ of right of advowson, the patron shall not alledge the explees or taking of the profits in himselfe but in his incumbent. And hereby the old bookes shall be the better understood, viz. *Bracton*, lib. 4. tract. 3. cap. nu. 5. *Est autem dominicum, quod quis habet ad mensam; et propriè, sicut sunt Boordlands, Anglicè.* And *Fleta*, lib. 5. ca. 5. *Est autem dominicum propriè terra ad mensam assignata. Dominicum etiam dicitur ad differentiam ejus quod tenetur in servitio.* But of an advowson and such like he shall plead, that he is seised *de advocacione ut de feodo et jure* (4).

“*Advowson,*” *Advocatio*, signifying an advowing of taking into protection, is as much as *jus patronatus*. Sir William Herle in 7 E. 3. fol. 4. saith, that it is not long past, that a man did know what an advowson was; but when a man would grant an advowson, he granted *ecclesiam* the church, and thereby the advowson passed. *Vide 45 E. 3. 5.* But surely the word is of greater antiquity; for in the Register there is an originall writ *de recto advocacionis*, and in the originall writ of assise *de darraine presentment* the patron is called *advocatus*. [*n*] *Vide W. 2. ca. 5.* And so doth [*o*] *Bracton* call him. *Advocatus autem dici poterit ille, ad quem pertinet jus advocacionis alicujus, ut ad ecclesiam presentet nomine proprio et non alieno.* And [*p*] *Fleta* lib. 5. cap. 14. agreeth herewith almost *totidem verbis*: *Advocatus est ad quem pertinet jus advocacionis alicuius ecclesie, ut ad ecclesiam nomine proprio non alieno possit presentare.* And [*q*] *Britton* cap. 92, the patron is called *avow*, and the patrons are called *advocati*, for that they be either founders or maintainers or benefactors of the church either by building dotation or increasing of it, in which respect they were also called *patroni*, and the advowson *jus patronatus*.

And

(2) [See Note 99.]  
(3) [See Note 100.]

(4) [See Note 101.]

[i] 7 E. 3. 63.  
24 E. 3. 74.  
34 H. 6. 34.  
19 E. 3. quas.  
imp. 154.  
Mirror cap. 2.  
sect. 17.

(Doctr. Plac.  
287. Post. 89. 3889)

[k] 6 Co. 51.  
Boswell's case.

[l] 8 E. 2.  
Privatization al  
Eglise 10.  
7 E. 3. 39.  
27 E. 3. 69.  
29 E. 3. 5.  
31 E. 3.  
Estoppel 940.  
(Post. 89. 344. b.)  
[m] 7 E. 3. 63.  
Bracton 603. 3721  
Fleta lib. 5.  
cap. 5.

7 E. 3. 4.

45 E. 3. 5.

[n] W. 2. ca. 5.  
[o] Bract. lib. 4.  
fo. 240.

[p] Fleta lib. 5.  
cap. 14.

[q] Britton  
cap. 92.

[r] 33 H. 6. 11.  
b. per Priot.  
14 H. 6. 15.  
per Newton.  
31 E. 1. droit  
68, 69. F. N. B.  
31. b. 10. Co.  
135, 136.  
R. Smith's case.  
45 E. 3.  
Fines 41.  
45 E. 3. 12.  
17 E. 3. 78.  
17 E. 2.  
Dower 163.  
(4. Co. 78.  
4. Co. 102.  
2. Inst. 375.)

And it is to be understood that there is a great [r] diversity *inter advocacionem medietatis ecclesie, &c. et medietatem advocacionis ecclesie* (5). and of their severall remedies for the same. For the advowson of the moiety is, when there be severall patrons and two severall incumbents in one church, the one of the one moiety thereof, and the other of the other moiety, and one part as well of the church as of the towne allotted to the one, and the [18. a.] other part thereof to the other; and in that case each patron if he be disturbed shall have a *quare impedit, quod permittat ipsum presentare idoneam personam ad medietatem ecclesie* (1).

(10. Co. 135.  
F. N. B. 33.)

But if there be two coparceners, and they do agree to present by turne, each of them in truth hath but a moiety of the church; but for that there is but one incumbent, if either of them be disturbed, she shall have a *quare impedit, &c. presentare idoneam personam ad ecclesiam*, for that there is but one church and one incumbent, and so of the like (2). But in [s] the said case of two coparceners, one of them shall have a writ of right of advowson *de medietate advocacionis*; for in truth she hath but a right to a moiety; but in the other case, where there be two patrons and two incumbents in one church, each of them shall have a writ of right of advowson *de advocacione medietatis*.

[s] Britton.  
20. 234.  
31 E. 1.  
droit 68, 69.  
F. N. B. 31. b.  
4. 33. a.  
4 H. 7. 2.  
17 E. 3. 38.  
75, 76.  
7 E. 3. 327.  
8 E. 3. 425. 22. An. p. 33. 14 H. 4. 10. 33 E. 3. quar. imp. 196.

And as there may (as hath beene said) be two severall parsons in one church, so there may be two that may make but one parson in a church. [t] Britton saith, *si ascun eglise soit done a divers persons per un sole avowe, nul ne se fura fleadre per assise de juris utrum ne nul estre implede sans l'autre, &c.* And therewith agreeth Fleta. [u] *Item licet aliqua ecclesia divisa fuerit inter duos, sive bona sua habeant communia sive separata, dum tamen unicum habeant advocatum, nullus eorum sine alio agere poterit vel implacitari.* And Fitzh. saith, that two prebendaries may be one parson of a church, who shall joyne in a *juris utrum*, so as one rectory may be annexed to two several prebends, and both of them make but one parson. But where one is parson of the one moiety of a church and another of the other moiety, as hath been said, there one of them shall have a *juris utrum* against the other, and in the writ shall name him *persona medietatis ecclesie, &c.* But for avoyding of suspicion of curiositie if we should proceed any further herein, we will attend what Littleton will further teach us.

[t] Britton,  
fo. 235.

[u] Fleta, lib. 5.  
ca. 19.

F. N. B. 49. c.

F. N. B. 49. p.

## Sect. 11.

**E**T nota, que home ne poit aver plus ample ou plus greinder estate d'enheritance (3) que fee simple.

**A**ND note, that a man cannot have a more large or greater estate of inheritance than fee simple.

THIS

(5) [See Note 109.]

[18. a.]

(1) [See Note 103.]

(2) See further on this subject Doder.

Advows. 21 2. Leon. 36. Dy. 78. b. & 299. W. Jo. 446. & Wils. vol. 2. p. 225. & 231.

(3) On inheritance, L. and M. Roh. P. and Red.

**T**HIS doth extend as well to fee simples conditional and qualified, as to fee simples pure and absolute. For our author speaketh here of the amplexness and greatness of the estate, and not of the perdurableness of the same. And he, that hath a fee simple conditionall or qualified, hath as ample and great an estate, as he that hath a fee simple absolute; so as the diversity appeareth betwene the quantity and quality of the estate.

From this state in fee simple, estates in taile and all other particular estates are derived; and therefore worthily our author beginneth his First Booke with tenant in fee simple, for *à principalioribus seu dignioribus est inchoandum*.

“*Ne possit aver plus ample ou greinder estate, &c.*” For this cause two [a] fee simples absolute cannot be of one and the selfsame land. If the king make a gift in taile, and the donee is attainted of treason, in this case the king hath not two fee simples in him, viz. the ancient reversion in fee, and a fee simple determinable upon the dying without issue of tenant in taile, but both of them are consolidated and conjoined together (4). And so it is, if such a tenant in taile doth convey the land to the king his heires and successors, the king hath but one estate in fee simple united in him, and the king's grant of one estate is good, and so was it adjudged in the court of common pleas. And yet in several persons by act in law, a reversion may be in fee simple in one, and a fee simple determinable in another by matter *ex post facto*; as if a gift in taile be made to a villeine, and the lord enter, the lord hath a fee simple qualified, and the donor a reversion in fee (5). But if the lord infee the donor, now both fee simples are united, and he hath but one fee simple in him. But one fee simple cannot depend upon another by the grant of the partie; as if lands be given to A. (6), so long as B. hath heires of his body, the remainder over in fee, the remainder is voyde (7).

[a] Pl. Com. 549. and 248.  
19 H. 8.  
Dier 4.  
29 H. 8.  
Dier 33. 16 Eliz.  
Dier 330.  
2. Marie  
Dier 107.  
Austen's case:  
Pa. 38 Eliz.  
rot. 108. in  
Quar. Imp.  
betweene the  
Queene Pl. and  
the Bishop of  
Lincolne Hufrey  
and others Bed.  
15 E. 4. 6. 8.

(Plowd. 589.  
Dy. 4. & 12. Cro.  
Jarm. 890. Finch.  
8vo. ed. 113.  
1. Ro. Abr. 827.  
Dy. 150. b.

## Sect. 12.

**I**TEM, *purchase est appel la possession de terres ou tenemens que home ad per son fait ou per agreement, a quel possession il ne aient per title de discent de nul de ses ancestors, ou de ses cousins, mes per son fait demesne.*

**A**LSO, purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he commeth not by title of descent from any of his ancestors, or of his cousins, but by his owne deed.

[18. b.] **P**URCHASE in Latin is either *acquisitum*, of the verbe *acquirō*, for so I fittle it in the original Register 234. In *terris vel tenementis, quæ viri et mulieres conjunctim acquisiverunt, &c.* Bracton calleth it *perquisitum*; and by [b] Glanvill it is called *questus* or *perquisitum*.

A purchase is always intended by title, and most properly by some kind of conveyance either for money or some other consideration,

Bracton lib. 2.  
fol. 65.

[b] Glanvill.  
lib. 7. cap. 1.  
Brit. c. 33.  
fo. 84. & 121.  
(1. Ro. Abr.  
827.)

(4) [See Note 104.]

(5) See acc. post. 117. a.

(6) The words *and his heires* seem wanting here.

(7) Acc. 10. Co. 97. b. See an observation on this doctrine by lord ch. justice Vaughan, who seems to question it. Vaugh. 269, 270.

Pl. Com. Willelmus  
bishe's ca. 47. b.  
1 H. 5. cap. 5.

(Cro. Jam. 366.  
Post. 27. a.  
3. Inst. 202.)

[c] 9 H. 4. 24.  
Mich. 10. Ja.  
piter in Com.  
hanc. in Wyn's  
case.

[d] B. Cassanemus  
fol. 13. Conc.  
29. 30 E. 3. 2.  
K. 3. 39 E. 3.  
6. 9. 10.  
1 H. 5. tit.  
Executors 108.  
tit. Descent.  
Br. 43.  
9 E. 4. 15.  
Madam Wiche's  
case.

[e] Vide  
28 H. 24.  
(12. Co. 104.)

Int. adjudicata  
coram Ruge Tr.  
41 E. 3. lib. 2.  
fo. 104. in Thrasun.  
Sect. 241, 242, &c.

tion, or freely of gift; for that is in law also a purchase (1). But a descent, because it commeth merely by act of law, is not said to be a purchase; and accordingly the makers of the act of parliament in 1 H. 5. ea. 5. speake of them that have lands or tenements by purchase or descent of inheritance. And so it is of an escheate or the like, because the inheritance is cast upon, or a title vested in the lord by act in law, and not by his own deed or agreement, as our author here saith (2). Like law of the state of tenant by the curtesie, tenant in dower, or the like. But such as attaine to lands by meere injury or wrong, as by disseisin, intrusion, abatement, usurpation, &c. cannot be said to come in by purchase, no more than robbery, burglarie, piracy, or the like, can justly be termed purchase (3).

If a nobleman, knight, esquire, &c. be buried in a church, and have his coat armor and pennons with his armes, and such other insignes of honour as belong to his degree or order, set up in the church, or if a gravestone or tombe be laid or made, &c. for a monument of him, [c] in this case albeit the freehold of the church be in the parson, and that these be annexed to the freehold, yet cannot the parson or any take them or deface them, but he is subject to an action to the heire and his heires in the honour and memory of whose ancestor they were set up (4). And so it was holden *Mich. 10 Ja.* and herewith agree the lawes [d] in other countries. Note this kind of inheritance. And some hold that the wife or executors that first set them up, may have an action in that case against those that deface them in their time (5). And note, that in some places chattels as heir-loomes (as the best bed, table, pot, can, cart, and other dead chattels moveable) may go to the heire (6), and the heire in that case may have an action for them at the common law, and shall not sue for them in the ecclesiasticall court; but the heir-loome is due by custome and not by the common law (7). And the [e] ancient jewels of the crowne are heir-loomes, and shall descend to the next successor, and are not devisable by testament. An heir-loome is called *principalium* or *hereditarium*,

*Consuetudo hundredi de Stretford in Com' Oxon' est, quoddam heredes tenementorum infra hundredum predictum existentium post mortem antecessorum suorum habebunt, &c. principalium, Anglice, an heire-loome, viz. de quodam genere catallorum, utensilium, &c. optimum plaustrum, optimam carucam, optimum ciphum, &c.*

Our author hath not spoken of parceners in this Chapter, for that he hath particular Chapters of the same.

#### Gradus Parentela, &c.

(1) [See Note 105.]

(2) [See Note 106.]

(3) See acc. ante 3. b.

(4) See Cro. Jam. 367. 2. Bulstr. 151. See  
top the several booke cited in Vin. Abr,

Descent E.

(5) [See Note 107.]

(6) [See Note 108.]

(7) [See Note 109.]



Cognati, quasi  
simul nati ex  
parte ipsius.

**Gratus Parentelæ & Confanguinitatis,**  
promeliori intelligentiâ Authoris nostri.  
*The Degrees of Parentage & of Consanguinity;*  
for the better understanding of our Author



**Adognati ex Parte Patris.**  
*Cousins on the part of the Father, the  
more worthy in Descent the further remote.*

Approved by  
*Bracton, lib. 2. cap. 31. id. op.  
Britton, cap. 89. fol. 220. ver.  
Fleta, lib. 5. cap. 7.  
Morton, cap. 1. § 3. & que Heretages.*



**Cognati ex Parte Matris.**  
*Cousins on the part of the Mother the less  
worthy in Descent the nearer of Kin.*

**Linca transvernalis seu collateralis.**  
The side Line.

**RECTA LINEA.**

**Linca transvernalis seu collateralis.**  
The side Line.

**Abpaterus magnus.**  
*The Great Grandfather*

**Tritavus.**  
*The Great Grandfather*

**Abavunculus magnus.**  
*The Great Uncles Grandfather*

**Abamita magna.**  
*The Great Uncles Grandmother*

**Attavus.**  
*The Great Grandfather*

**Abmatertera magna.**  
*The Great Uncles Grandmother*

**Propaterus magnus.**  
*The Great Uncles Father on the Fathers side*

**Abavus.**  
*The Great Grandfather*

**Proavunculus magnus.**  
*The Great Uncles Father on Mothers side*

**Atnepos linealis.**  
*The Great Grand son of the lineal  
Nephew or Niece.*

**Atneptis linealis.**  
*The Great Grand Daughter of the lineal  
Nephew or Niece.*

**Nepheus Son.**  
*Pronepus collat.  
The collateral  
Nephews  
Daughters  
et sic in  
infinitum.*

**Trinepos linealis.**  
*The Great Grand son of the lineal  
Nephew or Niece et sic in infinitum.*

**Trineptis linealis.**  
*The Great Grand Daughter of the lineal  
Nephew or Niece et sic in infinitum.*

**Nepheus Son.**  
*Pronepus collat.  
The collateral  
Nephews  
Daughters  
et sic in  
infinitum.*

Adognati, quasi  
Patre cognati.

## CHAP. 2.

## Of Fee taile.

## Sect. 13.

**T**ENANT in fee taile est per force de le statute de West. 2. cap. 1. car devant le dit statute, tous enheritances fueront fee simple; car tous les dones que sont specifiles deins mesme le statute fueront fee simple conditional al common ley, come appiert per le rehearsal de mesme le statute. Et ore per cel statute tenant en le taile est en deux maners, c'est ascavoir, tenant en taile generull, et tenant en taile special.

**T**ENANT in fee taile is by force of the statute of W. 2. cap. 1. for before the said statute, all inheritances were fee simple; for all the gifts which be specified in that statute were fee simple conditional at the common law, as appeareth by the rehearsall of the same statute. And now by this statute, tenant in taile is in two manners, that is to say, tenant in taile generall, and tenant in taile speciall.

“**T**ENANT en fee taile.” Tallium, or feodum talliatum, is derived of the French word tailler, scindere; for so Littleton himselfe in this Chapter, Sect. 18. saith.

(2. Inst. 332.)  
Mirror, cap. 2.  
sect. 16. & c. 1.  
sect. 5.  
(Post. 22. a.)

“*Le Statute de W. 2.*” This statute was made in 13 E. 1. and is called *West. 2.* because the parliament was holden at *Westminster*, [19.a.] and hath the name of the second, because another parliament was formerly holden at *Westminster* in the third year of the same king's raigne, which was called *Westminster* the first, And albeit manie parliaments were after holden at *Westminster* besides these, yet were they two onely, *propter excellentiam*, called the statutes of *Westminster*. And the act intended by *Littleton* is W. 2. ca. 1. upon which statute our author in the *Inner Temple* did learnedly read, whose reading I have. Of king *Ed. 1.* and of this statute, sir *William Herle*, chiefe justice of the court of common pleas, in 5 E. 3. 14. saith, that king E. 1. was the wisest king that ever was: and the cause of the making this statute was to preserve the inheritance in the blood of them to whom the gift was made. And in 9 E. 3. 22. he saith, that they were sage men that made this statute (1). See more of this in the Chapter of Warranties, Sect. 746.

(2. Inst. 331.)

5 E. 3. 14.

9 E. 3. 22.

Of this estate taile it is said, [a] *Modus legem dat donationi, et tenenda est etiam conventio, quia modus et conventio vincunt legem: ut si alicui cum uxore fiat donatio, habendum et tenendum sibi et heredibus quos inter eos legitime procreabunt, ecce quoddam donator vult tales heredes in hereditate paternâ et maternâ succedant, aliis heredibus eorum remotioribus penitus exclusis: et quoddam voluntas donatoris observari debet, manifestè apparet per hæc statuta. Quia autem dudum regi durum videbatur, &c.*

[a] Fleta lib. 3.  
cap. 9.  
Bract. lib. 2.  
cap. 5. & c.  
Brit. ca. 34.  
& 30.

“*Devant le dis statute [b] tous enheritances fueront fee simple.*” Here fee simple is taken in his large sense, including as well conditional or qualified, as absolute, to distinguish them from estates in taile since the said statute. Before which statute of *donis conditionalibus*, if land had beene given to a man, and to the heires males

[b] Vid. Sect.  
16. Brit. ca. 30.  
fol. 93. Pl.  
Com. 238. 503.  
Shelley's case.  
1. Co. 103.  
(2. Inst. 333.  
7. Co. 38.)

of

(1) However lord Coke in other places finds great fault with the statute *de donis*. See post. 10. b.

of his body, the having of an issue female had beene no performance of the condition; but if he had issue male, and dyed, and the issue male had inherited, yet he had not had a fee simple absolute; [c] for if he had died without issue male, the donor should have entred as in his reverter. By having of issue, the condition was performed for three purposes: First, to alien: Secondly, to forfeit: Thirdly, to charge with rent, common, or the like. But the course of descent was not altered by having issue (2): for if the donee had issue and died, and the land had descended to his issue, [d] yet if that issue had dyed (without any alienation made) without issue, his collaterall heire should not have inherited, because he was not within the forme of the gift, viz. heire of the body of the donee. [f] Lands were given before the statute in frankmarriage, and the donees had issue and died, and after the issue died without issue; it was adjudged, that his collaterall issue should not inherit, but the donor shall re-enter. So note, that the heire in taile had no fee simple absolute at the common law, though they were divers descents (3).

If lands had beene given to a man and to his heires males of his bodie, and he had issue two sonnes, and the eldest had issue a daughter, the daughter was not inheritable to the fee simple, but the younger sonne *per formam domi*. And so if land had beene given at the common law to a man and the heires females of his body, and he had issue a sonne and a daughter, and died, the daughter should have inherited this fee simple at the common law (4); for the statute of *donis conditionalibus* createth no estate taile, but of such an estate as was fee simple at the common law, and is descendable in such forme as it was at the common law. If the donee in taile had issue before the statute, and the issue had died without issue, the alienation of the donee at the common law, having no issue at that time, had not barred the donor.

[g] If donee in taile at the common law had aliened before any issue had, and after had issue, this alienation had barred the issue, because he claimed a fee simple: yet if that issue had died without issue, the donor might re-enter, for that he aliened before any issue, at what time he had no power to alien to barre the possibilitie of the donor. [h] But if feme tenant in taile had taken husband, and had issue, and the husband and wife had aliened in fee by deed before the statute, yet the issue might have had a *formdon in descender* (5); for the alienation was not lawful: but otherwise it is, if it had beene by fine. And these things, though they seem ancient, are necessarie notwithstanding to be knowne, as well for the knowledge of the common law, as for annuities and such like inheritances, as cannot be intailed within the said statute, and therefore remaine at the common law. [i] If the king before the statute of *donis conditionalibus* had made a gift to a man, and to the heires [19. b.] of his bodie begotten, the donee *post prolem suscitata* might have aliened as well as in the case of a common person. [k] But if the donee had no issue, and before the statute had aliened with warrantie, and died, and the warrantie had descended upon the king, this should not have bound the king of his reversion without assets;

[c] 44 E. 3. 3.  
30. B. 1. Forthdun  
66.  
7 B. 3. 6. 7.  
7 H. 4. 31.  
23 H. 4. 2.

[d] 29 E. 3. 46.  
18. Ass. p. 5.  
23 E. 4. 3.

[f] 4 H. 3.  
Formdon 36.  
10 Ass. 5.  
13 E. 4. 3.  
Pl. Com. 347. b.  
38 E. 2. tit.  
Formdon 58, 59.

[1. Ro. Abr.  
240.)  
[g] 30 E. 1.  
Formdon 5.  
Tempe E. 1.  
Sistem 62.  
19 E. 2.  
Formdon 67.  
Pl. Com. 346.

[h] 4 E. 2.  
Formdon 50.

[i. Ro. Abr.  
337.)  
[j] 6 E. 3. 56.  
Jas of Eatham's  
case.

[k] 45. Ass.  
p. 6.

(2) [See Note 110.]  
(3) [See Note 111.]

(4) [See Note 112.]  
(5) [See Note 113.]



assets; but otherwise it was in the case of a common person (1).

[7] Of the other side, if lands had beene given to the king and to the heires of his bodie, he could not before issue have aliened in fee, but onely to have barred his issue as a common person might have done, but not to have barred the reversion, for that should have beene a wrong in the case of a subject, and the king's prerogative cannot alter his case, nor make it greater than the donor gave unto him; and it is a maxime in law, that the king can do no wrong. When all estates were fee simple, then were purchasers sure of their purchases, farmers of their leases, creditors of their debts, the king and lords had their escheats, forfeitures, wardships and other profits of their seigniories: and for these and other like cases, by the wisdom of the common law all estates of inheritance were fee simple; and what contentions and mischiefs have crept into the quiet of the law by these fettered inheritances, daile experience teacheth us (2). But see more of this matter in the aforesaid Chapter of Warrantie, Sect. 746.

[7] Pl. Com.  
246. b.  
(Post. 372.  
370. b.)

10. Co. 38. in Post.  
ante.

"Common ley." See for explication hereof, Sect. 170.

"Come appiert per le rehearsall de mesme le statute." Here, by the authoritie of our author, the rehearsall or preamble of a statute, is to be taken for truth; for it cannot be thought, that a statute, that is made by authoritie of the whole realme, as well of the king, as of the lords spirituall and temporall, and of all the commons, will recite a thing against the truth.

Doct. and Stud.  
lib. 2. ca. 55.

"Et ore per cel statute tenant en taile est en 2. manners, seil tenant en taile generall, et tenant en taile especiall."

This division of an estate taile is perfect and sound; for the *membra dividenda*, viz. generall and speciall, are converted properly with the thing defined, and they are proved by many authorities of law, and approved of all learned men, and so are all the divisions through all his three bookes, which the studious and diligent reader will observe. And how excellent and difficult a thing it is to divide rightly and properly, especially in the law, the learned do know.

By this statute the land is as it were appropriated to the tenant in taile, and to the heires of his body; and therefore [r] if an estate be made, either before or since the statute of 27 H. 8 cap. 10. to a man and the heires of his bodie, either to the use of another and his heires, or to the use of himselfe and his heires, this limitation of use is utterly voyde. For before the said statute of 27 H. 8. he could not have executed the estate to the use; and so was it adjudged [s] in an *ejectione firma* between *John Cowper*, plaintife, and *Thomas Franklin*, &c. defendant (3).

(Plowd. 555.  
2. Ro. Ab. 780.)  
[r] 24 H. 8.  
tit. feoffments  
al uses 4.  
27 H. 8. fo.

[s] Pasch. 24.  
Jac. in the  
king's bench.

(1) [See Note 114.]

(2) Lord Coke in many other places is very strong in his representation of the inconveniences produced by the statute de

denis. See post. 370. b. and Mildmay's case 6. Co. 40. a.

(3) [See Note 115.]

## Sect. 14, 15.

**TENANT** en taile generall est, lou terres ou tenements son dones a un home et a ses heires de son corps engendres. En ceo case est dit generall taile, pur ceo que quelcunque feme, que tiel tenant espousa, (s'il avoit plusors femes, et per chescun de euz il ad issue) uncore chescun de les issues per possibilitie poit enheriter les tenements per force del done; pur ceo que chescun tiel issue est de son corps engendre.

**E**n meome le maner est, lou terres ou tenements sont dones a un feme, et, a les heires de sa corps issuants; coment que el avoit divers barons, uncore l'issue, que el poit aver per chescun baron, poit enheriter come issue en le taile per force de tiel done; et pur ceo tielx dones sont appellees generall tailes.

**TENANT** in taile generall is, where lands or tenements are given to a man, and to his heires of his bodie begotten. In this case it is said generall taile, because whatsoever woman, that such tenant taketh to wife, (if he hath many wives, and by every of them hath issue) yet everie one of these issues by possibilitie may inherit the tenements by force of the gift; because that everie such issue is of his bodie ingendred.

**I**N the same manner it is, where lands or tenements are given to a woman, and to the heires of her bodie; albeit that she hath divers husbands, yet the issue, which she may have by every husband, may inherit as issue in taile by force of this gift; and therefore such gifts are called generall tailes.

Vol. Sect. 1.

**"TERRES,"** terra, in his generall and legall signification, (as hath been said before) includeth not onely all kinde of grounds, as medow, pasture, wood, &c. but houses and all edifices whatsoever. In a more restrained sense it is taken for arable ground.

Ante 6. a.)

**"Tenements,"** tenementa. This is the only word which the said statute of W. 2. that created estates taile, useth; and it includeth, not only all corporate inheritances, which are or may be holden, but also all inheritances, issuing out of any of those inheritances, or concerning, or annexed to, or exercisable within the same, though they lie not in tenure, therefore all these without question may be entailed. As [r] rents, estovers, commons or other profits whatsoever, granted out of land; or uses, offices, dignities which concerne lands or certaine places, may be entailed within the said statute, because all these favour of the realtie. But if the grant be of an inheritance merely personal, or to be exercised about chattels, and is not issuing out of land, nor concerning any land, or some certaine place, such inheritances cannot be entailed, because they favour nothing of the realtie. But examples will illustrate and make this learning cleere.

The writ of assise [u] was *De libero tenemento*, and made his plaint of the office of the fourth part of the serjeant of the common place, and the writ adjudged good; and seeing that a man hath a freehold, *liberum tenementum* in it, by consequent it may be entailed.

The

[r] 7 E. 3. 363.

28 E. 3. 27.

7 H. 6. 8.

38 H. 6. 28.

8 E. 4. 3.

1 H. 7. 28.

4 H. 7. 9.

1 H. 8.

1 H. 8. fol. 2.

Nevill's case.

10 Co. 33, 34.

Pl. Com. in

Manxell's case,

fol. 2. & 3.

(7 Co. 33.

21 Co. 1.

1 Ro. Abr.

837-8.

20 Co. 87.)

[u] 7. Ass. p. 12.

7 E. 6. 1.

(Fitzh. N. B.

178. C.)

The office of the keeping of the church of our lady of *Lincolne* was intailed, and a *formedon* there brought upon that gift of the office by the issue in taile. The [x] office of the marshall of *England* intailed (1). The [y] office of one of the chamberlains of the exchequer intailed. 1 *H.* 7. 28. The office of a forrestership intailed. 4 *H.* 7. 10. 9 *E.* 4. 56. b. Charters intailed (2). 19 *H.* 8. 3. Use intailed. Nomination to a benefice intailed.

Also a name of dignitie may be intailed within the statute, [a] as dukes, marquesses, earles, viscounts, barons; because they be named of some countie, mannor, towne, or place (3). If the issue in taile [b] in a *formedon* in the *descender* be barred by a false verdict, his release is no barre to his issue, albeit the action is at the common law.

The like law is of a writ of error. 3 *Eliz. Dyer* 188. If a gift in taile be made with warrantie, the donee releases the warrantie, this shall not bind the issue in taile; for to all these cases and the like the said statute doth extend.

But if I grant to a man, and to the heires of his body, to be keeper of my hounds, or master of my horse, or to be my falconer, or such like, with a fee therefore, yet these cannot be intailed within the said statute, for that they be not issuing out of tenements, nor annexed to, or exercisable within, or concerning lands or tenements of freehold or inheritance, but concerning chattels, and savour nothing of the realtie. And so it is, if I by my deed for me and my heires grant an annuitie to a man, and the heires of his body, for that this only chargeth my person, and concerneth no land, nor savoureth of the realtie (4). In all these cases he hath a fee conditionall, as they were before the statute, and the grantee by his grant or release may barre his heire, as he might have done at the common law, for that in these cases he is not restrained by the said statute (5).

“*Et a ses heires de son corps engendres.*” In gifts in taile these words (*heires*) are as necessary, as in feoffments and grants; for seeing every estate taile was a fee simple at the common law, and at the common law no fee simple could be in feoffments and grants without these words (*heires*), and that an estate in fee taile is but a cut or restrained fee, it followeth, that in gifts in a man's life-time no estate can be created without these words (*heires*), unless it be in case of frankmarriage, as hereafter shall be shewed. And where *Littleton* saith (*heires*), yet (*heire*) in the singular number in a

[20. b] speciall case may create an estate taile, as appeareth by 39 Ass. p. 20. hereafter mentioned (1). And yet if a man give lands to *A. et heredibus de corpore suo*, the remainder to *B. in formā predictā*, this is a good estate taile to *B.* for that in *formā predictā* do include the other. If a man letteth lands to *A.* for life, the remainder to *B.* in taile, the remainder to *C. in formā predictā*, this remainder is void for the incertaintie. But if the remainder had bene, the remainder to *C. in eadem formā*, this had bene a good estate taile; for *idem semper proximo antecedenti refertur*. If a man give lands or tenements to a man, *et semini suo* or *exilibus vel proliibus de corpore suo*, to a man, and to his seed; or to the issues

18 E. 3. 27.

[x] 5 E. 4. 8.

10 E. 4. 14.

[y] 11 E. 4. 1.

1 H. 7. 28.

4 H. 7. 10.

9 E. 4. 56.

19 H. 8. 3.

1 H. 5. 1.

[a] 7 Co. 33.

34. Nevill's case.

28 H. 6. Lord

Veneys's case.

(b. Co. 7. b.

Post. 392. b.

1. Sid. 361.)

[b] 14. Ass. 2.

3 Eliz. Dyer

188.

Pl. Com. in

Manxel's case.

(10. Co. 58.

1. Ro. Abr. 837.

39. Ass. p. 20.

20 H. 6. 38.

5 H. 4. 7. b.

14 H. 4. 15.

(Post. 398. b.

1. Ro. Abr. 839.

8. Co. 57.

1. Co. 103.

Ante 9. b.)

(1) [See Note 116.]

(2) [See Note 117.]

(3) [See Note 118.]

(4) [See Note 119.]

(5) [See Note 120.]

[20. b]

(1) See this case post. 23. a.

(Cro. Eliz. 181.  
Ow. 64.  
S. C. Mo. 103.)  
Vid. Shelley's  
case. 1. Co.

(1. Ro. Abr. 837.)

(7. Co. 41.)

[c] 3 E. 3.  
tit. Breve 743.  
3 E. 3. tit.  
Estates.

[d] 13 H. 4. 2.

[c] 37 H. 6. 16.  
[f] 5 H. 6. 6.  
(7. Co. 41.)

[g] 13 H. 4. 2.  
per Horton.  
(Post. 37. a.  
26. b. 230. a.)

15 E. 2. tit.  
Bre. 836.  
24 E. 3. 28.

(7. Co. 41.  
Ow. 153.)

issues or children of his body, he hath but an estate for life; for albeit that the statute provideth, that *voluntas donatoris secundum formam in charta doni sui manifestè expressam de cetero observetur*, yet that will and intent must agree with the rules of law. And of this opinion was our author himselfe, as it appeared in his learned reading afore-mentioned upon this statute, where he holdeth, if a man giveth land to a man *et exitibus de corpore suo legitime procreatis*, or *semini suo*, he hath but an estate for life, for that there wanteth words of inheritance (2).

"*De son corps*." These words are not so strictly required but that they may be expressed by words that amount to as much: for the example that the statute of W. 2. putteth hath not these words (*de corpore*) but these words (*heredibus*) viz. *Cum aliquis dat terram suam alicui viro et ejus uxori et heredibus de ipsis viro et muliere procreatis*. If lands be given [c] to B. *et heredibus quos idem B. de primâ uxore sua legitime procrearet*, this is a good estate in especial taile (albeit he hath no wife at that time) without these words (*de corpore*). So it is [d] if lands be given to a man, and to his heires which he shall beget of his wife, [e] or to a man *et heredibus de carne sua*, or to a [f] man *et heredibus de se*. In all these cases these be good estates in taile, and yet these words *de corpore* are omitted.

It is holden [g] by some opinions, that if there be grandfather, father and sonne, and lands are given to the grandfather, and to his heires begotten by the father, the father dyeth, the grandfather dyeth, the sonne is in as heire to the grandfather begotten upon the body of his father, and the wife of the grandfather in that case shall be endowed. But certaine it is, that in some cases one shall have the land *per formam doni* that is not issue of the body of the donee, which see Section 30.

"*Engendres*." This word may in many cases be omitted or expressed by the like, and yet the estate in taile is good: as, *heredibus de carne, heredibus de se, hered' quos sibi contigerit*, &c. as is afore-said; and where the word of *Littleton* is, *ingendred*, or begotten, *procreatis*, yet if the word be *procreandis*, or *quos procreaverit*, the estate in taile is good; and as *procreatis* shall extend to the issues begotten afterwards, so *procreandis* shall extend to the issues begotten before (3).

## Sect. 16.

**T**ENANT en taile speciall est, l'ou terres ou tenements sont dones a un home et a sa feme, et a les heires de l'ou deux corps engendres. En tiel case nul poet inheriter per force de le dit done, forsque ceux que sont ingendres perenter eux deux. Et est appelle speciall taile, pur ceo que si la feme

**T**ENANT in taile speciall is, where lands or tenements are given to a man and to his wife, and to the heires of their two bodies begotten. In this case none shall inherit by force of this gift but those that be engendered between them two. And it is called especial taile, because

(2) [See Note 121.]

(3) [See Note 122.]

*feme deuy, et il prent auler feme, et ad issue, l'issue del second feme ne serra jammes inheritable per force de tiel done, ne auxy l'issue del second baron, si le primer baron devie.*

because if the wife die, and he taketh another wife, and have issue, the issue of the second wife shall not inherite by force of this gift, nor also the issue of the second husband, if the first husband die.

“*A UN home et sa feme,*” [a] Then put the case that lands be given to a man and a woman unmarried, and the heires of their two bodies: for the appaerent possibilitie to marry, they have an estate taile in them presently. [b] So it is where lands be given to the husband of *A.* and to the wife of *B.* and the heires of their bodies, they have presently an estate in taile, in respect of the possibilitie.

[a] 5 H. 7. 10.  
11 E. 3.  
Formdon 30.  
Pl. Com. 38.

[b] 10. Co. 120.  
Chudley's case.  
40. Ass. Pl. 13.  
34. Ass. Pl. 1.  
Fleta, lib. 5. c. 34.

If a feme sole do enfeoffe a married man *causa matrimonii prelocuti*, it is good for the possibilitie. But put the case that the premises and the *habendum* be in other manner than *Littleton* hath put, and

[21. a.] let us see what the law is in these cases. [c] (1) As if a man in the premisses give lands to another and the heires of his bodie, *habendum* to him and his heires for ever; it hath beene holden that in this case he hath an estate taile, and a fee simple expectant. And so (it is said) *vice versa*, if lands be given to a man and to his heires in the premisses, *habendum* to him and the heires of his bodie, that he hath an estate taile, and a fee simple expectant. But *vid. lib. 8. fo. 154. b.* otherwise resolved, *ut patet ibi* (2). [d] If lands be given to *B.* and his heires, to have and to hold to *B.* and his heires, if *B.* have heires of his bodie, and if he die without heires of his bodie that it shall revert to the donor, this is adjudged an estate taile, and the reversion in the donor. [e] For *voluntas donatoris in charta doni sui manifeste expressa observetur*; and therefore in the case next precedent, if these or the like words be added (and if he die without heires of his bodie, that the lands shall revert to the donor), that then the *habendum* shall by authoritie of divers bookes be construed upon the whole deed, to be a limitation or a declaration, what heires are meant in the premisses to inherit, and that in that case the reversion is in the donor (3).

(Flou. 35.  
Post. 25. b.  
F. N. B. 204. b.  
Post. 204. a.  
1. Ro. Ab. 419.)  
[c] 21 H. 6. 7.  
(Perk. Sect. 18,  
170. 2. Sid. 78.  
3. Co. 56. b.  
3. Co. 154.  
Flou. 147.  
2. Ro. Abr.  
680.)

[d] 30. Ass.  
p. 47. 35. Ass.  
p. 14. 37. Ass. 15.  
5 H. 5. 6.  
(2. Ro. Abr. 68.  
Cro. Jam. 695.  
200. 427. 448.)  
[e] W. 2. cap.  
22.

[f] If a man make a charter of feoffment of an acre of land to *A.* and his heires, and another deed of the same acre to *A.* and the heires of his bodie, and deliver seisin according to the forme and effect of both deeds, in this case he cannot take a fee simple onely, as some hold, for that liverie was made according to the deed in taile, as well as to the charter in fee, neither can the livery enure onely to the deed of estate taile with a fee simple expectant, for that liverie was made as well upon the deed in fee simple, as the deed in taile. Therefore others hold, that in that case it shall enure by moities, that is, to have an estate taile in the one moitie, with the fee simple expectant, and a fee simple in the other moitie; and so the liverie shall worke immediately upon both deeds (4).

[f] 2 H. 6. 25.  
45 E. 2. 20.  
(Vid. 5. Co. 25.  
where two fines  
are levied.)

(1) [See Note 123.]  
(2) [See Note 124.]

(3) [See Note 125.]  
(4) [See Note 126.]

## Sect. 17.

**E**N mesme le maner est, lou tene-  
ments sont dones per un home a  
un auter ove un feme, que est la fille  
ou cousin al donour en frankmariage,  
le quel done ad un enheritance per  
ceux parolx (frankmariage) a ceo  
annexe, coment que ne soit expresse-  
ment dit ou rehece en le done,  
c'est ascavoir, que les donees averont  
les tenements a eux et a leur heires  
perenter eux deux engendres. Et ceo  
est dit especial taile, pur ceo que l'issue  
del second feme ne poit inheriter,  
&c.

**I**N the same manner it is, where  
tenements are given by one man  
to another with a wife (which is the  
daughter or cousin to the giver) in  
frankmariage (5), the which gift  
hath an enheritance by these words  
(frankmariage) annexed unto it, al-  
though it be not expresly said or  
rehearsed in the gift (that is to say)  
that the donees shall have the tene-  
ments to them and to their heires  
betweene them two begotten, And  
this is called especial taile, because  
the issue of the second wife may not  
inherit.

Yid. Sect. 10. 20.  
(2. Ro. Abr. 67.)

5 E. 3. 17.

[A] 1 his case is  
vouched in Pl.  
Com. 158. to be  
in 4 E. 3. which  
bring not found  
(6) in that  
year, it is there  
so left without  
any further re-  
ference, but you  
shall find it as  
above said in  
5 E. 3. 17.  
W. 2. ca. 1.  
19 E. 3. tit.  
Taile 1.

"**A** UN home ove un feme." Albeit the gift is made of the  
land to the man with his daughter, &c. yet is the gift good  
to them both in speciall taile, and therefore, that of *Stephen de la  
More* in [g] 5 E. 3. is very remarkable, where the case was, that  
*Robert* gave the reversion of lands which *Agnes* his wife did hold  
for her life to *Stephen de la More*, *habendum post mortem dictæ  
Agnetis in liberum maritagium cum Johanna filia ejusdem Roberti*,  
and it is adjudged that it is a good estate taile, Wherein three  
things are to be observed: first, that *Joane* the daughter took with  
her husband an estate in especiall taile, albeit she were named but  
under a *cum*, viz. *cum Johanna*, &c. (7). 2. That *cum* doth come  
after the *habendum*, for that it is all but one sentence. 3. That  
these words, *in liberum maritagium*, doe create an estate of inheri-  
tance in especiall taile, as *Littleton* saith, *le donee ad un in-  
heritance per reason de ceux parolx (frankmariage) a ceo* [21. b.]  
*annexe, coment que ne soit expressement dit, &c.* But this had need  
of some interpretation, for if lands be given by these words (in  
frankmariage), according to the rules of law, then do these words  
create an estate of inheritance in speciall taile: for the considera-  
tion of marriage is in that case more favoured in law, than any  
other consideration, But though the gift be in these words, yet if  
it be not consonant to the rules of law in other things requisite  
thereunto, there they create but an estate for life. And therefore  
to speak once for all, four things be incident to a frankmariage,  
First, that it be given for consideration of marriage either to a  
man, with a woman, or, as some have held to a woman with a man,  
For in [A] 6 E. 3. 33. in *Piers de Saltmarsh* his case, a man gave  
land to his sonne in frankmariage; and *Fitz. N. B.* 172. taketh  
the law so also: and 7 E. 4. 12. *per Moyle* against a new opinion  
in *temps H. 8. Br. tit. Frankmariage*, the former bookes being  
not

(1. Ro. Abr.  
340.)

[A] 6 E. 3. 33.  
Fitz. N. B. 172.  
7 E. 4. 12.  
15 E. 2. Cui in  
vita, Sect. 24.

(5) Before or after marriage. Dy. 147.  
Hal. MSS.—See aq. post. 31. b. and  
176. a.

(6) The case is 4 E. 3. 4. Hal. MSS.  
(7) [See Note 127.]

not remembred. Secondly, that the woman or man that is the cause of the gift [*i*] be of the blood of the donor; but it may be made as well after marriage as before, and it may be made with a widow, &c. Thirdly, if the gift be made of such a thing as lyeth in tenure, that the donees hold of the donor at the time of the estate in frankmariage made. A rent service [*k*] may be given in frankmariage, because it may be holden. And so may a rent charge or rent secke, as *Fitz. N. B.* holdeth, and it appeareth in our bookes that a common was granted in frankmariage. (1) Fourthly, that the donees shall hold freely of the donor till the fourth degree be past. And therefore if land be given to a woman, with a sonne of the donor in frankmariage, there passeth an inheritance; but if the donee that is the cause of the gift be not of the blood of the donor, then there passeth but an estate for life if livery be made. Also if [*l*] lands be given to a man with a woman of the blood of the donor in *liberum maritagium*, the remainder in fee either to a stranger or to the donees, they have no estate taile, because there is no tenure of the donor (2); but if [*m*] in that case, the remainder had beene limited to another in taile reserving the reversion in fee to the donor, there the said words (*in liberum maritagium*) create an inheritance, because the donees hold of the donor. And this is the cause that it is holden, that a man cannot devise land in frankmariage because the donee cannot hold of the donor. And *cestuy que use* before the statute of 27 *H.* 8. could not have made a gift in frankmariage, because the reversion was in the feoffees. [*n*] And if the donor doth give lands in *liberum maritagium* reserving a rent, this reservation shall take no effect till the fourth degree be past, but the frankmariage is good; for if the reservation should be good, then could not the donees have an estate taile for want of the words of the heires of their bodies (3).

“*En frankmariage.*” *Liberum maritagium*, free marriage. *Maritagium* is taken for fee taile, and divideth *maritagium* into *liberum et servitio obligatum*: and herewith agreeth *Bracton* [o] lib. 2. cap. 34. and 39. *Maritagium est aut liberum aut servitio obligatum*, and lib. 2. ca. 7. nu. 3. and 4. *Liberum maritagium dicitur, ubi donator vult quod terra sic data quiescat sit et libera ab omni seculari servitio*. And so, before *Bracton*, said *Glanvill*, lib. 7. ca. 18. *Maritagium autem aliud nominatur liberum aliud servitio obnoxium. Liberum dicitur maritagium, quando aliquis liber homo aliquam partem terre sue dat cum aliqua muliere in maritagium, ita quod ab omni servitio terra illa sit quiesca, &c.* And after both of them *Fleta* that followeth them both, lib. 3. cap. 1. saith, *est autem quoddam maritagium liberum ab omni servitio solutum donatori vel ejus heredi, &c. Et est similiter maritagium servitio obligatum et oneratum, &c.* And these words (*in liberum maritagium*) are such words of art, and so necessarily required, as they cannot be expressed by words equipollent, or amounting to as much. As if a man give lands to a man with his daughter in *connubio soluto ab omni servitio, &c.* yet there passeth in this case but an estate for life; for seeing that these words (*in liberum maritagium*) create an estate of inheritance against the generall rule of law, the law requireth that they

[7] 4 E. 3. 2.  
31 E. 1. taile  
30. Bracton  
lib. 2. cap. 7.

[k] 22 R. 2.  
tit. Descent 60.  
Fitz. N. B. 312.  
9 H. 6. 34. b.  
W. 2. ca. 1. acc.

[7] Temp. H. 6.  
Br. frankmar.  
11. 13 E. 1.  
Formdon 63.  
Vid. 32 E. 1.  
tail. 25. 3 E. 2.  
Feoffment &  
feitz 9.  
17 E. 3. 5. a.  
45 E. 3. 20.  
(1. Ro. Abr.  
340.)  
[m] 30 E. 2.  
aid 174. 31 E. 3.  
Gard. 216.

[n] Bract. lib. 2.  
cap. 7. 32 E. 1.  
taile 31.  
13 H. 4. 74.  
4 H. 6. 17.  
26. Am. 66.  
31 E. 3.  
Car. 29.  
26. Am. p. 69.  
per Wilbye.  
[o] Bract. lib. 2.  
cap. 34. & 39.  
& lib. 2. cap. 7.  
nu. 3. & 4.  
Glanvill. lib. 7.  
ca. 1. & ca. 18.

Fleta lib. 3.  
cap. 1.

(1) [See Note 128.]

(2) [See Note 129.]

(3) [See Note 130.]

30 E. 1. tit.  
Formdon 66.  
adjudg. acc.  
(2. Inst. 336.)

31 E. 3. tit.  
Gard. 116.  
Murr. emp. 2.  
sect. 15. acc.

9 H. 3. Dower.  
302.  
7 H. 4. 16.

[p] 13 E. 3. tit.  
Ass. 19 E. 3.  
Ass. 83.  
12. Ass. 22.  
10. Ass. 2.  
8 E. 3. Ass. 45.  
(F. N. B. 204.)  
[q] Pl. Com.  
Cartill's case.  
[r] 17 H. 3. tit.  
Gard. 146.  
27 E. 3. 70.

they should be legally pursued. But then it may be demanded, if a man had given lands at the common law, *in libero maritagio*, whether had the donees a fee simple without these words (heires), for that it appeareth by that which hath beene said before, that all gifts in taile were fee simple at the common law, and that the statute of *W. 2.* did not create any estate in fee taile, but out of an estate in fee simple. To this it is answered, that these words (*in liberum maritagium*) did create an estate in fee simple at the common law: and it is holden in 31 E. 3. gard. 116. *Per ceux parolx in frankmariage les donees averont les terres a eux et a leur heires percenter eux engendres, et ceo est dit especial taile.* But yet betweene donees in frankmariage and other donees in speciall taile there be many notable diversities. If the king give land to a man and a woman, and the heires of their two bodies, and the woman die without issue, yet shall the man be tenant in taile *apres possibilitie*. But if the king give land to a man with a woman of his kindred in a frankmariage, and the woman dyeth without issue, the man in the king's case shall not hold it for his life, because the woman was the cause of the gift; but otherwise it is in the case of a common person, if lands be given to a man and a woman [22. a.] in especiall taile, and they are divorced *causâ præcontractâ*, both shall hold the lands for their lives; but in [h] case of frankmariage if they be so divorced, the woman shall enjoy the whole land, because she was the cause of the gift (1). If lands holden in socage [q] be given in especiall taile, and the donees die the issue being within the age of 14 yeares, [r] the next of kinne of the part of the father or of the part of the mother which can hap the custody shall have it, but in case of frankmariage the heire of the part of the mother shall have it, because as it hath been said she was the cause of the gift.

## Sect. 18.

**E**T nota, quòd hoc verbum (Talliare) idem est quòd ad quandam certitudinem ponere, vel ad quoddam certum hæreditamentum limitare. Et pur ceo que est limit et mis en certaine, quel issue inheritera per force de tiels dones, et come longement l'enheritance endurera, il est appelle en Latin, feodum talliatum, i. e. hæreditas in quandam certitudinem limitata. Car si tenant in general taile morust sans issue, le doner ou ses heirs poient entrer come en leur reversion.

**A**ND note, that this word (Talliare) is the same as to set to some certaintie, or to limit to some certaine inheritance. And for that it is limited and put in certaine, what issue shall inherite by force of such gifts, and how long the inheritance shall indure, it is called in Latine, *feodum talliatum*, i. e. *hæreditas in quandam certitudinem limitata*. For if tenant in generall taile dieth without issue, the doner or his heires may enter as in their reversion (3).

“ET”

(1) *Kellw.* 104. b. *Accord.* Hal. MSS. See also acc. *Perk.* Sect. 238.

(3) [See Note 182.]



**"ET nota."** This in our author, throughout his three bookes, betokens some notable point of instruction worthy of more speciall observation, which is often [s.] used by him, as you may perceive by the Sections noted in the margent (2).

(Ante 17. b.)

[s.] Sect. 18.  
37. 42. 43. 49.  
50. 64. 72. 89.  
90. 104. 108. 114.

116. 147. 159. 161. 168. 170. 183. 264. 279. 346. 397. 482. 497. 618. 619. 637. 642. 670. 682. 684. 711. 717. 719. 738.

**"Feodum talliatum, i. e. hereditas in quandam certitudinem limitata."** Here our author doth interpret what *feodum talliatum* is. Of all the estates taile most coercted or restrained, that I finde in our bookes, is the estate taile in 39 Asa. Pl. 20. where lands were given to a man and to his wife and to one heire of their bodies lawfully begotten, and to one heire of the body of that heire only; this case being adjudged in the point is an exception (some say) out of the generall rule put before by *Littleton*, Sect. 13. that all estates taile were fee simple at the common law; for (say they) by this limitation (*heredi*) in the singular number the donees had not had a fee simple at the common law. *Vide Registrum Judiciale*, fo. 6. a gift made to a man *et heredi masculo de corpore suo* (4).

West. 2. cap. 3.  
Pl. Co. 261. B.  
39. Asa. Pl. 20.  
(1. Co. 66. 104.  
Ante. 2. b.  
1. Ro. Ab. 832.)

Sect. 13. Vid.  
Pl. Com. fo.  
29. b.

Regist. Judic.  
fo. 6.

## Sect. 19.

**EN** mesme le maner est del tenant *En special taile, &c. Car en chescun done en le taile sauns plus ouster dire, le reversion del fee simple est en le donor. Et les donees et lour issues ferront al donor et a ses heires autielx services, come le donor fait a son seigneur prochain a luy paramount, forprise les donees in frankmarriage, les queux tiendront quietment de chescun maner de service, sinon que soit per feallie, tanque le quart degree soit passe, et apres ceo que le quart degree soit passe l'issue en le cinque degree, et issint ouster l'auters des issues apres luy, tiendront del done ou ses heires come ils teignent ouster, come il en avant dit.*

**I**N the same manner it is of the tenant in especiall taile, &c. For in every gift in taile without more saying, the reversion of the fee simple is in the donor. And the donees and their issue shall do to the donor, and to his heires the like services, as the donor doth to his lord next paramount, except the donees in frankmarriage, who shall hold quietly from all manner of service (unlesse it be for fealtie) untill the fourth degree is past, and after the fourth degree is past the issue in the fift degree, and so forth the other issues after him, shall hold of the donor or of his heires as they hold over, as before is said.

**"EN chescun done en taile sans plus ouster dire, le reversion del fee simple est en le donor."** This is wrought by the construction of the statute of *W. 2. cap. 1.* which hath turned the fee simple of the donee into a particular estate of inheritance, and the possibility of the donor, to a reversion in him expectant upon the

(2. Inst. 331. 333.)

[22. b.] estate taile, so as there be two inheritances of one land: yet this was doubted in our bookes [t] and there resolved according to *Littleton*. But I see no cause wherefore that point should be drawne in question, for at the same session of parliament

[t] 12 E. 4. 22.  
5 H. 7. 14.  
West. 2. ca. 13.  
Pl. Com. 247.  
248. 251. 502.  
3 E. 2. tit. resc. it  
147.

33 H. 6. 27. 39 E. 3. 19. 45 F. 3. 2.

(2) [See Note 131.]

(4) [See Note 133.]

(in which the statute *de donis conditionalibus* was made) viz. ca. 3. it is expressly said, *vel per donum in quo reservatur reversio*, so as by the judgment of the same parliament a reversion was settled in the donor.

(Foot. 142. b.  
Foord. 151. 162.  
196, 207. Cro.  
Cha. 400.)

"*Le reversion del fee simple est en le donor.*" A reversion is (1) where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of his estate, as here in the case of *Litt.* Tenant in fee simple maketh gift in taile, so it is of a lease for life, or for yeares. If a man extend lands by force of a statute merchant, staple, recognizance or *elegit*, he leaveth a reversion in the conusor. But since *Littleton* wrote, the description must be more large upon the statute of [a] 27 H. 8. for at this day, if a man seised of lands in fee make a feoffment in fee, (and depart with his whole estate) and limit the use to his daughter for life, and after her decease, to the use of his sonne, in taile, and after to the use of the right heires of the feoffor: in this case, albeit he departed with the whole fee simple by the feoffment, and limited no use to himselfe, yet hath he a reversion (2); [b] for whensoever the ancestor takes an estate for life, and after a limitation is made to his right heires, the right heires shall not be purchasors. And here in this case when the limitation is to his right heires, and right heire he cannot have during his life (for *non est hæres viventis*) the law doth create an use in him during his life, untill the future use commeth *in esse*, and consequently the right heires cannot be purchasors; and no diversitie when the law creates the estate for life, and when the party. And all this was adjudged betweene [c] *Fenwicke* and *Mitford* in the king's bench, and if the limitation had been to the use of himselfe for life, and after to the use of another in taile, and after to the use of his owne right heires, the reversion of the fee had been in him, because the use of the fee continued over in him (3); and the statute doth execute the possession to the use in the same plight, quality, and degree, as the use was limited.

[d] If a man make a gift in taile, or a lease for life, the remainder to his own right heires, this remainder is void, and he hath the reversion in him, for the ancestor during his life beareth in his body (in judgment of law) all his heires, and therefore it is truly said, that *hæres est pars antecessoris*. And this appeareth in a common case, that if land be given to a man and his heires, all his heires are so totally in him, as he may give the lands to whom he will.

[e] So it is if a man be seised of lands in fee, and by Indenture make a lease for life, the remainder to the heires male of his owne body, this is a void remainder; for the donor cannot make his own right heire a purchaser of an estate taile without departing of the whole fee simple out of him (4): as if a man make a feoffment in fee to the use of himselfe for life, and then to the use of the heires male of his body, this is a good estate taile executed in himselfe, and the limitation is good by way of use, because it is raised out of the state of the feoffees, which the feoffor departed with, and that

[a] 27 H. 8.  
ca. 10.  
(Cro. Cha. 24.  
1. Ro. Abr. 625.  
1. Co. 104. b.  
2 Co. 91.  
2. Ro. Abr. 417.  
1. Leon. 182.)  
[b] 38 E. 3. 26.  
37 E. 3. Page  
118. 24 E. 3. 36.  
40 E. 3.

[c] Tr. 31 Eliz.  
after *Fenwicke*  
and *Mitford*.  
32 H. 8. gard.  
93. 28 H. 8.  
Dier. 8, 9, 10.  
See *Buckenham's*  
case.  
5. Marie. Dier.  
165.  
(1. Ro. Abr.  
222. Mo. 284.)  
[d] 1 H. 3. 8.  
4 H. 6. 30.  
9 Eliz. Dier.  
*Bromley's* case.

[e] Dier. 8.  
Marie 150.  
*Greewold's*  
case adjudged.  
*Bendlowes*  
Serjeant in his  
report agreeth.  
(Hob. 26. 33.  
7. Mod. 237. 1.  
1. Ro. Rep. 246.)

(1) By what words a reversion will pass, see Vin. Abr. *Reversion* G. and Com. Dig. *Estates* B. 12.

(2) Vid. 3. & 4 P. & M. Dy. 134. contra. Hal. MSS. But see the case cited

by lord Hale in the next note, and also ante 12. b. and note 2. there.

(3) [See Note 134.]

(4) [See Note 135.]

is apparent, for a limitation of use to himselfe had without question beene good.

[f] If a man make a feoffment in fee to the use of himselfe in taile, and after to the use of the feoffee in fee, the feoffee hath no reversion, but in nature of a remainder, albeit the feoffor have the estate taile executed in him by the statute, and the feoffee is in by the common law, which is worthy of observation.

[f] 20 Eliz.  
Dier.

[23. a.] To conclude this point, [g] whosoever is seised of land, hath not only the estate of the land in him, but the right to take profits, which is in nature of the use, and therefore when he makes a feoffment in fee without valuable consideration to divers particular uses, so much of the use as he disposeth not, is in him as his ancient use in point of reverter. As if a man be seised of two acres, the one holden by knights service by prioritie, and the other by knights service holden by posterioritie, and maketh a feoffment in fee of both acres to the use of himselfe and his heires, the old use continues in him, and the prioritie and posterioritie remaine. So it is of lands of the part of the mother, the use shall goe to the heire of the part of the mother, which could not be, if it were not the old use, but a thing newly created. The like law of lands of the custome of Borough-English, Gavelkind, &c. (1).

[g] 13 H. 7. 6.  
28 H. 8. Dier.  
12.  
(3 Co. 81. b.  
Cro. Jam. 401.  
Post. 271. b.)

5 E. 4. 7.  
1. Co. 76. 84.  
85. 100. 8c.  
Chudley. 2. 60.  
86. 57. 58. 77.  
78. 4. Co. 22.  
6. Co. 34. 43.

*“Les donees et leur issues feront al donor et a ses heires autiels services, come le donor fait a son seignior procheine a luy paramount.”*

The reason of this is, that when by construction of the said statute there was a reversion settled in the donor, for that the donee had an estate of inheritance, the judges resolved that he should hold of his donor, as his donor held over (2); as if the tenant had made a feoffment in fee at the common law, the feoffee should have holden of the feoffor as he held over, and before the statute of W. 2. the donee had holden of the donor as of his person, and now of him as of his reversion; but if a man make a lease for life, or years, and reserve nothing, he shall have fealtie only and no rent, though the lessor hold over by rent, &c. And this, that *Littleton* saith, is regularly true, if the donor maketh no speciall reservation, for then the speciall reservation excludes the tenure which the law would create. As if tenants by knights service maketh a gift in taile reserving fealtie and rent, the donee shall hold in socage, by fealtie and rent, and not by knights service (3). But if a man hold land of the king in grand serjeantie, and maketh a gift in taile generally, in this case the donee shall not hold of the donor by grand serjeantie, because no man can hold by grand serjeantie, but of the king only, as hereafter shall be said; and therefore seeing grand serjeantie doth include knights service, he shall in that case hold of the donor by knights service. If a man seised of land in the right of his wife holden by knights service giveth the same lands in taile generally, the donee shall not hold of him by knights service, because his wife held the land, and he had nothing but in her right. And in that case the baron hath gained a new reversion wrong, and therefore such a donee shall doe fealtie only (4).

(Post. 143. 4.)

(2. Ro. Abt.  
501.)

(Doct. Hng.  
53.)

seised of two acres of land, holdeth the one of B. by knights rice, and twelve pence rent, and the other of C. in socage and pennie rent, and makes a gift in taile of both acres without any resse reservation of any tenuré. In this case the donor hath but one

(1) [See Note 136.]  
(2) [See Note 137.]

(3) [See Note 138.]  
(4) [See Note 139.]

one reversion. And yet he shall make several avowries, because there be severall tenures created by law in respect of the severall tenures over: and the avowrie is made in respect of the tenures.

(2. Ro. Abs.  
501.)

Lord, mesne and tenant, the tenant holdeth by four pence, and the mesne by twelve pence, the tenant makes a gift in taile without reserving any thing, by reason whereof he holdeth by foure pence, in respect of the tenure over. Afterwards the reversion escheats, now shall the donee hold by twelve pence, for the mesnaltie which was four pence is extinct, and the law reserved the tenure upon the gift in taile, in respect of the mesnaltie, and when the mesnaltie is extinct, the former rent between the donor and donee is extinct also; and then by the same reason that the donee shall take advantage, if the donor by release or confirmation had holden by lesser services, by the same reason he shall be prejudiced, when he holdeth by greater services (5).

49 E. 3. 10.

Bracton lib. 2.  
lib. 21.  
Britton c. 119.  
Fleta lib. 3.  
cap. 11. & lib. 6.  
cap. 2.  
Vid. Sect. 17. 20.  
(Ante 11. b.  
Post. 178. a.)

"*Forsprise les donees en Frankmarriage.*" It is to be understood, that although the land be given in *liberum maritagium*, in free marriage generally, yet first the law doth make a limitation of this word (free), viz. till the fourth degree be past, for the reason that our author here yeeldeth (6). And 2. albeit it be free marriage, yet the donees and their issues untill the fourth degree be past shall do fealtie, for that is incident to everie tenure (except frankalmoigne) and cannot be separated from it, and therefore the donees and their issues shall hold it as freely till the fourth degree be past as the donor can make it. See more of this in the Chapter of Frankalmoigne.

## Sect. 20.

**ET** les degres en frankmarriage serront accompts en tiel manner, scil. de le donor a les donees en frankmarriage le primer degre, pur ceo que la feme que est une des donees covient estre file, soer, ou autre cousin a le donor. Et de les donees tanque a lour issue il serra accompt le second degre, et de lour issue tanque a son issue le tierce degre, et issint ouster, &c. Et la cause est, pur ceo que apres chescun tiel donee, les issues queux reignont de le donor, et les issues queux reignont de les donees apres le quart degre passe de ambideux parties en tiel forme d'estre accompt, poyent enter eux per la ley de saint esglise entermarie. Et que le donee en frankmarriage serra dit le prime degre de les quart degres, home poit

reier

**A**ND the degrees in frankmarriage shall be accounted in this manner, viz. from the donor to the donees in frankmarriage the first degree, because the wife that is one of the donees ought to be daughter, sister, or other cosen to the donor. And from the donees under their issue shall be accounted the second degree, and from their issue unto their issue the third degree, and so forth. And the reason is, because that after every such gift, the issues of the donor, and the issues of the donees after the fourth degree past of both parties in such forme to be accounted, may by the law of the holy church entermarie (1). And that the donee in frankmarriage shall be said to be the first degree

(5) Vid. *Keilw.* 125. 129.—Hal. MSS.  
(6) [See Note 140.]

(1) [See Note 141.]

*reier en un plee sur un breecce de droit de garde, P. 31 E. 3. lou le pl. counta que son tres-aiel fuit seisie de certe terre, &c. et ceo tenust d'un autre per service de chivaler, &c. quel dona la terre a un Rafe Holland ovesque sa soer en frankmarriage, &c.*

gree of the foure degrees, a man may see in a plea upon a writ of right of ward, P. 31. E. 3. where the pl. pleadeth that his great grandfather was seised of certaine lands, &c. and held the same of another by knights service, &c. who gave the land to one *Raphe Holland* with his sister in frankmarriage, &c.

[23. b.] **W**HERE *Littleton* saith [a] that the donces in frankmarriage shall hold by fealtie only untill the fourth degree be past, and then the issue in the fift degree shall hold of the donor as the donor holdeth over. [b] *Vide Bracton ubi supra, Ita quod ille cui terra sit data fuit, nullum inde faciat servitium usque ad tertium heredem, et usque quartum gradum, ita quod tertius hares sit inclusus.* And herewith also agreeth *Fleta ubi supra*. And the [c] learning of degree set out in the civil and canon law (wherein I find some difference) is worth the knowledge, to the end that *Littleton* and the law in this case may the better be

[a] *Vide Sect. 17. 19. 138. 268, 269. 271. 733.*

[b] *Glanvill. lib. 7. cap. 18. Bract. lib. 2. fol. 21. Britton c. 119. Fleta lib. 3. c. 11. & lib. 6. cap. 2.*

[c] *Vid. 10 E. 3. tit. a vowry 157. 31 E. 3. cccxviij. 22. 31 K. 3. gard. 116. 21 H. 7. 30.*

**Rule. 1.]** understood, which I will divide into certain rules; whereof the first is, that a person added to a person in the line of consanguinitie maketh a degree. And it is to be understood, that a line is threefold, viz. the line ascending, descending, and collateral. And first for example, of the ascending line, take the sonne and add the father, and it is one degree ascending; add the grandfather to the father, and it is a second degree ascending.

2. So as how many persons there be, take away one, and you have the number of degrees. If there be foure persons it is the third degree, if five the fourth, for one must exceed, and then you have the degree. Likewise by the descending, take the father, and add the sonne, and it is one degree; then take the sonne and add the grandchild, and it is the second degree; and so likewise further. Wherein observe that the father, son and grandchild, albeit there are three persons, yet they make but two degrees, because (as it hath been said) one must exceed for making a degree.

3. It is to be noted, that in every line the person must be reckoned from whom the computation is made. And there is no difference between the canon and civil law in the ascending and descending line (2); for those whom the civilians do reckon in the second degree, the canonists do reckon in the first (3); and those whom they

[24. a.] place in the fourth, these place in the second. Therefore if we will know in what degree two of kindred do stand according to the civil law, we must begin our reckoning from one, by ascending to the person from whom both are branched, and then by descending to the other to whom we do count, and it will appeare in what degree they are. For example, in brothers and sisters sonnes, take one of them and ascend to his father, there is one degree from the father to the grandfather, that is the second degree; then descend from the grandfather to his sonne, that is the third degree; then from his sonne to his sonne, that is the fourth. But by the canon law there is

(Plowd. 443)

(Vid. Stat. 32 H. 8. cap. 28. of marriage. 2. Inst. 683. 25 H. 8. cap. 22.)

(Plowd. 444)

(2) The words *but in the collateral line* there is seem necessary to the sense of this passage; and though not to be found in

any edition of lord Coke's Commentary were probably omitted by mistake,

(3) [See Note 142.]

is another computation, for the canonists do ever begin from the stocke, namely, from the person of whom they do descend; of whose distance the question is. For example, if the question be, in what degree the sonnes of two brothers stand by the canon law, we must begin from the grandfather and descend to one sonne, that is one degree; then descend to his sonne, that is another degree; then descend againe from the grandfather to his other sonne, that is one degree; then descend to his sonne, that is a second degree; so in what degree either of them are distant from the common stocke, in the same degree they are distant, betweene themselves: and if they be not equally distant, then we must observe another rule. In what degree the most remote is distant from the common stocke, in the same degree they are distant betweene themselves, and so the most remote maketh the degree. And albeit the donee be a cousin in the third or fourth degree from the donor, yet in this computation it maketh the first degree: *gradus dicitur à gradiendo, quia gradiendo ascenditur et descenditur*. And thus much of the civile and canon law is necessarie to the knowledge of the common law in this point (1): and herewith agreeth our author in the words following.

*“Les issues que x vignont de le donör, et les issues queux veignont de les donces apres le 4. degree passe d'ambideux parties in tielforme d'estre account, poient enter eux per ley de saint esglise entermarrier.”* (*De saint Esglise*). [d] So as hereby it appeareth, that the computation of the degrees in this case, must be according to the canon law. But it is necessarie to be knowne concerning marriages betweene persons of kindred one to another, that it is enacted [e] by the statute of 32 H. 8. that no reservation or prohibition (God's law except) shall trouble or impeach any marriage without the Leviticall degrees (2).

The case vouched by *Littleton* in 31 E. 3. you shall finde abridged by *Fitz.* tit. gard. 116. And albeit this yeare of 31 E. 3. was never in print till *Fitzherbert* did abridge it and publish it in print anno 11 H. 8. and goeth under the name of broken yeares, yet here it appeareth by our author, that the same is of authoritie in law, as hereafter also in other places shall be observed.

## Sect. 21.

**E**T tous ceux taillés arcaun dits sont spécifiés en le dit estatute de W. 2. Aury sont divers autres estates en le taile, coment que ne sont spécifiés per expresse parols en le dit estatute, mes ils sont prisés per le equité de le dit estatute. Sicome terres sont dones a un home et a ses heires males de son corps

**A**ND all these entailés aforesaid be specified in the said statute of W. 2. Also there be divers other estates in taile, though they be not by expresse words specified in the said statute, but they are taken by the equité of the same statute. As if lands be given to a man, and

(1) See further as to consanguinity, and the manner of computing its degrees by the civil and canon law, Blackst. Law Tracts, 8vo. ed. v. 1. p. 14. and 173. and the annotations in the edit. of the *Corp.*

*Jur. Canon.* by the *Pithæi* on that Gratian's *Decretum* cited by lord Haic, Inst. lib. 3. tit. 6. et Dig. 38. tit. 10 the commentators on those titles.

(2) [See Note 143.]

*corps engendres, en tiel case son issue male inheritera, et le issue femal ne unque enheritera pas, uncore in les auters tailes avant dits auterment est.*

his heires males of his bodie begotten; in this case his issue male shall inherit, and the issue female shall never inherit, and yet in the other entailles aforesaid, it is otherwise.

**E** T tous ceux tailes avant dits sont specifics en le dit estatute de Westminster 2." And so it appeareth by the said statute, *Auxy sont divers autres estates en le taile, &c.* And herewith agreeth Carbonel's case, 33 Edw. 3. titulo taile 5.

That the cases of the statute are set down but for examples of estates taile, generall and speciall, and not to exclude other estates taile. 3 E. 3. 32. 18. Ass. p. 5. 18 E. 3. 46. 1. Mur. Dyer 46. Pl. Com. Seignior Barkley's case, fo. 251. For, *Exempla illustrant non restringunt legem.*

[24.b.] "*Equitie*" is a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischiefe, or cause of the making of the same, shall be within the same remedie that the statute provideth: and the reason hereof is, for that the law-makers could not possibly set downe all cases in expresse terms: *Æquitas est convenientia rerum quæ cuncta coaquiparat, et quæ in paribus rationibus paria jura et judicia desiderat.* And againe, *Æquitas est perfecta quædam ratio quæ jus scriptum interpretatur et emendat, nullâ scripturâ comprehensa, sed solum in verâ ratione consistens. Æquitas est quasi equalitas. Bonus judex secundum æquum et bonum judicat, et æquitatem stricto juri præfert. Et jus respicit æquitatem* (1).

"*Sicome terres sont done a un home et a les [f] heires males de son corps engendres, en tiel case son issue male inheritera, et l'issue female ne unques inheritera, &c.*" This shall be explained afterward, Sect. 24. (2).

3 E. 3. 32.  
18 E. 3. 46.  
18. Ass. p. 5.  
1. Mur. Di. 46.  
Pl. Com. 251.  
(5. Co. 99.  
3. Co. 31.)

Bract. lib. 4.  
fol. 186.  
[f] 18. Ass. p. 5.  
18 E. 3. 46.  
33 E. 3. tit.  
Taile 5.  
3 E. 3. 32 Pl.  
Com. Seignior  
Barkley's case.  
1. Mur. Dy. 46.  
V. Sect. 24.

## Sect. 22 &amp; 23.

**E**N mesmele manner est, si terres ou tenements soient dones a un home et a ses heires females de son corps engendres; en tiel case son issue female luy inheritera per force et form de le dit done, et nemy issue male, pur ceo que en tiels cases de dones faits en le taile, queux doivent enheriter, et queux nemi la volunt del donor serra observe.

ET

**I**N the same manner it is, if lands or tenements be given to a man and to his heires females of his bodie begotten; in this case his issue female shall inherit by force and forme of the said gift, and not his issue male. For in such cases of gifts in taile, the will of the donor ought to be observed, who ought to inherit, and who not.

AND

ty. Construing statutes by equi-  
59 Plowd. 9, 10. 17, 18. 36. 46. 53. 57.  
36 88. 109. 124. 177. 204. 244. 363, 364.  
See also Vin. Abr. Sta-

tutes E. 6. Hatt. Treat. on Stat. Ash. Exposit.  
of Stat. by Eq. and Com. Dig. Parliament  
R. 10.

(2.) [See Note 144.]

**E**T en le case que terres ou tene-  
ments sont dones a un home, et  
a ses heires males de son corps is-  
suants, et il ad issue deux firs, et deuy,  
et l'eign firs entra come heire male,  
et ad issue file et deuy, son frere atera  
la terre, et nemi la file, pur ceo que  
le frere est heire male. Mes auter-  
ment serra en autres tailes, queux  
sont specifiés en le dit statute.

**A**ND in case where lands or tene-  
ments be given to a man, and  
to the heires males of his bodie, and  
he hath issue two sonnes, and dieth,  
and the eldest son enter as heire  
male, and hath issue a daughter,  
and dieth, his brother shall have the  
land, and not the daughter, for that  
the brother is heire male. But  
otherwise it is in the other entailles,  
which are specified in the sayd sta-  
tute.

**T**HESE two Sections, or any thing therein, do need no expla-  
nation, in respect they shall be also explained hereafter in  
the next Section, saving onely these words (*queux doivent inheriter*)  
are verie observable, for they implie a diversitie betweene a discent  
and a purchase. For when a man giveth lands to a man and the  
heires females of his body, and dyeth having issue a son and  
a daughter, the daughter shall inherit; for the will of the donor  
(the statute working with it) shall be observed. But in case  
[g] of a purchase it is otherwise; for if *A.* have issue a sonne and  
a daughter, and a lease for life be made, the remainder to the  
heires females of the bodie of *A.* *A.* dieth, the heire female can  
take nothing, because she is not heire (3); for she must be both  
heire and heire female, which she is not, because the brother is  
heire, and therefore the will of the giver cannot be observed, be-  
cause here is no gift, and therefore the statute cannot worke there-  
upon. And so it is if a man hath a sonne and a daughter, and  
dieth, and lands be given to the daughter, and the heires females  
of the bodie of her father, the daughter shall take nothing [25. a.]  
but an estate for life, because there is no such person, she  
being not heire. But where a gift is made to a man, and to the  
heires female of his bodie, there the donee being the first taker is  
capable by purchase, and the heire female by descent (1), *secun-  
dum formam doni*: and therefore *Littleton* purposely added these  
words, *queux doivent inheriter*.

## Sect. 24.

**A**UXI, si terres soient donees a un  
home et a les heires males de son  
corps ingendres, et il ad issue file,  
quel ad issue firs, et deuy, et puis apres  
le donee deuy; en cest case, le firs de  
la file ne inheritera pas per force de  
la taile; pur ceo que quecunque que  
serra inheriter per force d'un done en  
le taile fait as heirs males, covient  
conveyer son discent tout per les heires  
males. Mes en tiel case le donor poet  
entrer, pur ceo que le donee est mort  
sans

**A**LISO, if lands be given to a man  
and to the heires males of his  
body, and he hath issue a daughter,  
who hath issue a sonne, and dieth  
and after the donee die; in this  
case, the son of the daughter shall  
not inherit by force of the enta-  
because whosoever shall inherit  
force of a gift in taile made to  
heires males, ought to convey  
descent whole by the heires ma-  
Also in this case the donor may

(Rept. 164.  
1. Co. 103, 104.)  
(Hob. 31.)  
[g] 9 M. 6. 24.  
11 H. 6. 13, 14.  
37 H. 8. Br. tit.  
Done 42. tit.  
noume 1. & 40.  
Dyer 23.  
El. 374.  
Shelly's case.  
1. Co.

(Rept. 26. b.)

(3) [See Note 145.]

(1) [See Note 146.]



*sans issue male en la ley, entant que le issue del file ne poet conveyer a luy mesme le discent per heyre male.*

ter, for that the donee is dead without issue male in the law, insomuch as the issue of the daughter cannot convey to himselfe the descent by an heire male.

**Q**UECUNQUE serra enheriter per force d'un done en taile, &c." Vide Tr. [h] 28 H. 6. tit. Devise 18. (which is not in the booke at large, but written *verbatim* out of *Statham*). If a man devise lands to a man, and to the heires males of his body, and (2) hath issue a daughter, which hath issue a sonne, this sonne shall be inheritable, and notwithstanding in a gift in taile the law is otherwise, and that by the opinion of all the judges in the exchequer chamber. But I hold this case to be ill-reported, unlesse you will referre the opinion of the judges to the gift in taile last mentioned.

For first, albeit a devise may create an inheritance by other words than a gift can, yet cannot a devise direct an inheritance to descend against the rule of law. Secondly, there is no intent of the devisor appearing, that the sonne of the daughter should, against the rule of law, inherit, and the statute provideth, that *voluntas donatoris, &c. observetur*. And I have heard this case often denied to be law, both in the king's bench and in the common pleas. Vide Pl. Comment. 414. b. And so it is [i] *mutatis mutandis*, when a gift in taile is made to a man, and to the heires females of his body, and he hath issue a sonne, who hath issue a daughter, this daughter shall never inherit, because she must convey by descent from females. And for the reason hereof see a notable case in 15 E. 2. tit. Corone 385. where it is adjudged (as before it had beene) that the sonne of a female should have an appeale of the death of a cosine, and yet the daughter herselfe should never have had it. But there it is agreed, that the sonne of a female [k] in a *libertate probandâ*, should be no witness or prooffe against the issue of the male. And the reason of this diversity is very observ-

[25. b.] able: for by the common law the female might have had an appeale as heire to any of her ancestors, as well as the male. But by the statute of *Magna Charta*, cap. 34. *Nullus capiatur aut imprisonetur propter appellam famina de morte alterius quam viri sui*, which restraineth not the sonne of the female. And there *Scrope* saith, *per toute le serjeantis d'Angleterre*, that is, by all the judges of the coise in *England*, it was awarded, that the issue of the female should have an appeale for the death of his cousin. But in a *libertate probandâ*, the issue of the blood female shall not be received to prove villenage in the issue of the blood male, for the mother was disabled by the common law, and the mother might be a wife *de eu et trene*, that is, of the water and whippe of threec cords (meaning such a bond-woman as is used to servile workes and correction), and enfranchised by her husband. which appeareth in the said booke. And it is holden in 3. 4. 1. that if a man be slaine which hath no heire of the part of his father, that his uncle of the part of his mother shall have appeale, and yet he must of necessity make his conveyance by man. Vide 20 H. 6. fo. 53. the question suddenly demanded and

Vid. Sect. 719.

[A] 1 H. 6. 24.  
11 H. 6. 13, 14.  
28 H. 6. tit.  
Devise 18.  
Statham tit.  
Devise. Pl. Com.  
in Scholast.  
case 414. b.  
20 H. 6. 43.  
37 H. 3. Br. tit.  
Done & Rem.  
61. tit. nosme 1. &  
40.  
(Hob. 33. Post.  
377.)  
1. Ro. Abr.  
841.)

[F] 11 H. 6. 13.

15 E. 2. tit.  
Cor. 385.  
(Ante 6. b.)

[k] Mirror c. 2.  
sect. 7. Vid.  
Glanvil lib. 14.  
cap. 3.

(2. Inst. 63.)  
Vid. *Seignior de la Ware's case*.  
11. Co. fo. 17.

17 E. 4. 1.

20 H. 6. 53.

The word *he*, to describe the devisee, is wanting. See acc. *Statham* Abr.

and debated, and no consideration or mention had of the said former judgments and authorities. There it is compared to a gift in taile to a man and to his heires males of his body, that the heire male of the daughter shall not inherit; which hath no affinity to it; and yet the authority of the booke is great, for it is by the assent of all the justices of the one bench and the other in the exchequer chamber; and therefore I leave the learned and judicious reader to his owne judgment. [1] *Vide Stanford* 58. b. 15. E. 2. 384. If a man give lands to a man and to the heires males of his body begotten, remainder to him and to his heires females on his body begotten, the donee hath issue a sonne, who hath issue a daughter, who hath issue a son, this sonne is not inheritable to either of both these estates taile, because, as *Littleton* saith, the male must make his conveyance only by males, and so must the female by females. But in this case the land shall revert to the donor. And therefore the safest way, when a man will entail his lands to the heires males and females of his bodie, is to limit the first estate to him and the heires males of his body, the remainder to him and to the heires of his body, and then all his issues whatsoever are inheritable. But if *A.* hath issue a sonne and a daughter and dieth, and the sonne hath issue a daughter and dieth, and a lease for life is made, the remainder to the heires females of the body of *A.*; in this case the daughter of *A.* shall not take *causa quâ supra*. But albeit the daughter of the son maketh her conveyance by a male, she shall take an estate taile by purchase, for she is heire and a female: but if lands be devised to one for life, the remainder to the next heire male of *B.* in taile, and *B.* hath issue two daughters, and each of them hath issue a sonne, and the father and daughters die, some say this remainder is void for the uncertainty; some say that the eldest shall take it, because he is worthiest; and others say that both of them shall take, for that they both make but one heire (1). If lands be given to a man and to the heires males or females of his body, he hath an estate in generall taile in him.

## Sect. 25.

**E**N mesme le manner est, lou tenements sont done a un home et a sa feme, et a les heires males de leur deux corps engendres, &c.

**I**N the same manner it is, where lands are given to a man and his wife, and to the heires males of their two bodies begotten, &c.

11 E. 3. Formedon 80.

(Antq 20. b.)

[m] 15 H. 7. 10.  
1. Co. Dilon &  
Frein's case.  
40. Ass. p. 13.

“**A** UN home, et a sa feme.” But what if tenements be given to a man, and to a woman being not his wife, and to the heires males of their two bodies? They have also an estate taile, albeit they be not married at that time (2). And so it is, if lands be given to a man which hath a wife, and to a woman which hath a husband, and the heires of their two bodies; they have presently an estate taile, [m] for the possibility that they may marry. But if lands be given to two husbands and their wives, and to the heires

(1) Vid. hic. fol. 10. b. *Harpur's case*.  
Hal. MSS.

(2) [Sec Note 147.]

heires of their bodies begotten, [n] they shall take a joint estate for life and several inheritances, viz. the one husband and his wife the one moiety, and the other husband and wife the other moiety, and no crosse remainder or other possibility shall be allowed by law, where it is once settled and has taken effect. But if lands be given to a man and two women, and the heires of their bodies begotten, [o] in this case they have a joynt estate for life and every of them a severall inheritance, because they cannot have one issue of their bodies, neither shall there be by any construction a possibility upon a possibility (3), viz. that he shall marry the one first and then the other (4). And the same law it is, [h] when land is given to two men and one woman, and to the heires of their bodies begotten.

[n] 24 E. 3.  
29. a.  
(Dy. 330.)

[o] 7 H. 4. 16.  
26 E. 3. 73.  
Littleton, fo. 66.  
17 Edm. Dic.  
386.  
[h] 44 E. 3. 62.

Table 13.

[26. a.]

Sect. 26, 27.

26, 27. These two Sections need no explanation at all.

**ITEM**, si tenements soient dones a un home et a sa feme, et a les heires del corps del home engendres, en ceo case le baron ad estate en le taile generall, et la feme forsqe estate per terme de vie.

**A**LSO, if tenements be given to a man and to his wife, and to the heires of the bodie of the man, in this case the husband hath an estate in generall taile, and the wife but an estate for terme of life.

**ITEM**, si terres soient dones a le baron et sa feme, et a les heires le baron queux il engendra de corps sa feme, en ceo case le baron ad estate en le taile speciall, et la feme forsqe pur terme de vie.

**A**LSO, if lands be given to the husband and wife, and to the heires of the husband which he shall beget on the body of his wife, in this case the husband hath an estate in especiall taile, and the wife but an estate for life.

Sect. 28.

**E**T si le done soit fait al baron et a sa feme, et a les heires la feme de sa corps per le baron engendres, donque la feme ad estate en especial taile, et le baron forsqe pur terme de vie (1). Mes si terres sont dones a le baron et a la feme, et a les heires que le baron engendra de corps la feme, en ceo case ambideux ont estate en

**A**ND if the gift be made to the husband and to his wife, and to the heires of the body of the wife by the husband begotten, there the wife hath an estate in speciall taile, and the husband but for terme of life. But if lands be given to the husband and the wife, and to the heires which the husband shall beget on

(3) As to the doctrine of not allowing possibility on a possibility, see post. 184.

(4) [See Note 148.]

[26. a.]

(1) [See Note 149.]

*en la taile, pur ceo que cest parol (heires) n'est limit a l'un plus que a l'autre (2).*

on the body of the wife, in this case both of them have an estate taile, because this word (heires) is not limited to the one more than to the other.

19 H. 6. 75 a.  
Regist. 230.  
17 E. 2. tit.  
Taile 32.  
3 E. 3. 32.  
4 E. 3. 43.  
5 E. 3. 29. b.  
21 E. 3. 43.  
12 H. 4. 1.  
[g] 3 E. 3. 32.  
21 E. 3. 43.  
19 H. 6. 75.  
per H. dy.  
Regist. 230.  
(1. Sid. 83.)

“**H**EIRES.” This word (*heires*) is *nomen operativum*. To which of the donees it is limited, it createth the estate taile; but if it incline no more to the one than to the other, then both doe take, as here *Littleton* putteth the case. And therewith accordeth the case of [g] 3 E. 3. where it appeareth, *quod Robertus de S. dedit Johanni de Riharijs et Matilde uxori ejus, et heredibus quousidem Johannes de corpore ipsius Matilde procrearet, &c.* and this adjudged to be an estate in especiall taile in them both, because the estate is equally tailed to the heires of the baron as to the heires of the wife. (3) If lands be given to the husband and the wife, and to the heires of the body of the surviour, the gift is good, and the surviour shall have an estate in taile generall, but the estate taile vesteth not till there be a surviour. And hereby it appeareth [r] that a gift made to a man and to the heires of his body, is as good as to his heires of his body.

(r) 20 E. 3.  
Michie 377.

## Sect. 29.

[26. b.]

**I**TEM, si terre soit done a un home et a ses heires, que il engendra de corps sa feme, en ceo case le baron ad estate en especial taile, et la feme n'ad riens.

**A**LSO, if land be given to a man and to his heires, which he shall beget on the body of his wife, in this case the husband hath an estate in speciall taile, and the wife hath nothing.

20 H. 6. 36.  
[s] 1. Co. fol.  
240. b.  
Chudleigh's case  
adjudge-  
(7. Co. 41.)

**T**HIS is evident by that which hath been said, and needeth no explanation. But it hath beene said, [s] that if a man give land to another and to his heires of the body of such a woman lawfully begotten, that this is no estate taile for the uncertainty by whom the heires shall be begotten, for that the brother of the donee or other cousin may have issue by the woman, which may be heire to the donee, and estates in taile must be certaine. Therefore our author to make it plaine in all his cases added to these words (*his heires*) which he shall ingender. But that opinion is, since our author wrote, over-ruled, and that estate adjudged to be an estate taile, and begotten shall be necessarily intended begotten by the donee (1).

## Sect. 30.

**I**TEM, si home ad issue fils, et devie, et terre est done al fils, et a les heires de corps son pier engendres ceo est bone taile, et uncore le pier fuit

**A**LSO, if a man had issue a sonne and dyeth, and land is given to the sonne, and to the heires of the body of his father begotten, this is a good

(2) Et ils ont en cell case tiel estate, sicome terre furent donez a eux et a lez heires de leus deux corps engendres. L. and M.

(3) [See Note 150.]

[26. b.]

(1) [See Note 151.]

*fuit mort al temps de la done. Et mults autres estates en taile y sont per le equitie del dit estatute, que icy ne sont specifies.*

a good entaile, and yet the father was dead at the time of the gift. And there be many other estates in the taile, by the equity of the said statute, which be not here specified.

“*SI home ad issue fita et devie, &c.*” John de Mandevile by his wife Roberge had issue Robert and Mawde. Michael de Morevill gave certaine lands to Roberge and to the heires of John Mandevile her late husband on her body begotten, and it was adjudged that Roberge had an estate but for life, and the fee taile vested in Robert (heires of the body of his father being a good name of purchase), and that when he dyed without issue, Mawde the daughter was tenant in taile as heire of the body of her father, *per formam doni* (2), and the formedon which she brought supposed, *quod post mortem prefate Robergie et Roberti filii et heredis ipsius Johannis Mandeville et hered' ipsius Johannis de prefata Robergia per prefatum Johannem procreat' prefat' Matilda filie predict' Johannis de prefata Robergia per prefatum Johannem procreat' a sorori et heredi predicti Roberti descendere debet per formam donationis predict'*. And yet in truth the land did not descend unto her from Robert (3), but because she could have no other writ it was adjudged to be good. In which case it is to be observed, that albeit Robert being heire took an estate taile by purchase, and the daughter was no heire of his body at the time of the gift, yet she recovered the land *per formam doni*, by the name of heire of the body of her father, which notwithstanding her brother was, and he was capable at the time of the gift; and therefore when the gift was made she tooke nothing but in expectancy, when she became heire *per formam doni*. But where a man by deede gave lands to Emme late wife of John Master, *habendum et tenendum predict' Emme et heredibus Johannis Master de corpore ejusdem Emme procreat'*; in that case the sonne and heire of John Master begotten on the body of Emme took no estate with Emme in the lands, because he was named after the *habendum* (4).

If a man hath issue two daughters, and dieth seised of two acres of land in fee simple, and the one coparcener giveth her part to her sister, and to the heires of the body of her father, in this case the donee hath an estate taile in the moiety of the donor's part, for the donee is not the entire heire, but the donor is heire with the donee, and she cannot give to the heires of her owne body, and the donee, hath the other moiety of her sister's part for life. If a man hath issue a sonne and a daughter, and dieth, and land is given to the

[27. a.] daughter, and to the heires females of the body of the father she taketh but an estate for life; because she is not heire female to take by purchase, as before hath been said.

“*Et a les heires de corps le pier.*” These words (*les heires*) are observable; for if they were (*ses heires*) it cleerly altereth the case. And therefore, if lands be given to the sonne and to his heires of the body of his father, the sonne cannot take as heire of the body of his

(Ante 20. b.)

17 E. 2. Taile  
23. 2 E. 3. 1.  
tit. Taile 7.  
4. and 5. Ph.  
and Mar. Dien.  
156. 13 H. 4. 1.  
16 H. 7. 10.  
(F. N. B. 213.  
E. 2. Leon. 24.  
Co. Entr. 254.)

(Post. 220.)

5 H. 4. 3. 2.

(3. Re. Abr. 67.  
69.)

(Akte 24. b. 24. a.)

(2) [See Note 152.]  
(3) [See Note 153.]

(4) [See Note 154.]

his father, because the grant is to him and to his heires, &c. and consequently he hath a fee simple (1). But if there be grandfather, father and sonne, and the father dieth, and lands be given to the sonne, and to the heires of the body of the grandfather, this is a good estate taile in the sonne; so as *Littleton* did put his case of the father but for an example (2).

(Note 20. b.  
Foot. 240. a.)

"*Et multæ autres estates en le taile y sont, &c.*" This needeth no explanation.

## Sect. 31.

**M**ES si home done terres ou tenements a un autre, a aver et tener a luy et a ses heires males, ou a ses heires females, il, a que tiel done est fait, ad fee simple, pur ceo que n'est my limit per le done, de quel corps l'issue male ou female issira, et issint ne poit en aucun maner estre prise per l'equitie del dit estatute, et pur ceo il ad fee simple.

**B**UT if a man give lands or tenements to another, to have and to hold to him and to his heires males, or to his heires females, he, to whom such a gift is made, hath a fee simple, because it is not limited by the gift, of what bodie the issue male or female shall be, and so it cannot in any wise be taken by the equitie of the said statute, and therefore he hath a fee simple.

(Note 18. b.  
Foot. 68. b.)

"**T**ERRES ou tenements." This rule extendeth but to lands or tenements, and not to the inheritance that noblemen and gentlemen have in their armories or armes. For where the nobleman or gentleman hath a fee simple in his armories or armes, yet is the same descendible to the heires males lineall or collaterall. For albeit a female be heire at the common law, yet the shield, armories and armes descend unto them that are able to beare them (farre exceeding the nature of Gavelkind, but with several differences). And all the females of that family in respect that they be of the same blood, may in a losenge or under a curtaine manifest of what family they be by expressing the armories and armes belonging to that family, and the husbands of them may impale them or quarter them with their owne as the case shall require. And for distinction and better explanation hereof: If the king by his letters patents giveth lands or tenements to a man, and to his heires males, the grant is void, for that the king is deceived in his grant, in as much as there can be no such inheritance of lands or tenements as the king intended to grant. But if the king for reward of service granteth armories or armes to a man and to his heires males, without saying (of the body,) this is good, and, as hath been said, they shall descend accordingly (3).

14 H. 8. the  
Patents. Br. 104.  
(1. Co. 43. b.  
46. b. Mo. 424.  
Cro. Eliz. 479.)

37 H. 8. 27.

If

(1) [See Note 155.]

(2) Vid. *Dy.* 24. 247. 274. 157. 394.  
for the form of the writ. Hal. MSS.

(3) See further as to the descent of *Arms*,

p. 140. b. See also on the subject of *Arms*  
in general, Dugd. Ant. Usage in bearing of  
*Arms* and several pieces in Hearn. Antiq.  
Disc. 2d ed. vol. 1.

If a man by his last will devise lands or tenements to a man and to his heires males, this by construction of law is an estate taile, the law supplying these words (of his bodie) (4). *Vide* the Prince's [r] case, where it appeareth that an act of parliament may limit an inheritance of lands or tenements, otherwise than common law would doe, and create a new estate of inheritance, and many authorities in law there cited worthy of note and observation. *Rot. Parliam. anno 1 E. 4. nu. 26. (5)*. The [u] duchie of Lancaster is entailed to king Edward the fourth and his heires kings of England. And king Henry the sixth did by his letters patents grant *Johanni filio Johannis Talbot, quod ipse et heredes sui domini manerij de Kingston Lisle in comitatu Berk. ex nunc domini et barones de Lisle nobiles et proceres regni habeantur, teneantur, et reputentur, &c.* By this he had a fee simple qualified in the dignity (6). 2 H. 5. fol. 1. A grant was made to a man, and to his heires tenants of the manor of Dale (7). A man seised of lands in Gavelkind gives or devises the same to a man and to his eldest heires. He cannot hereby alter the customary inheritance, but as in the case of our [27. b.] author, *ut res magis valeat*, the law rejecteth (males), so in this case the law rejecteth this adjective (eldest). And so it is if lands be given to a man, and to the eldest heires females of his body, yet all the daughters shall inherit, as it hath beene resolved.

"*Et issint ne poest estre prise per l'equitie del dit statute, &c.*" For it is a certaine rule in law, that in every estate in taile within the said statute, it must be limited either by expresse words or by words equipollent of what body the heire inheritable shall issue. And it was [x] adjudged in parliament, that where lands were given to a man, and to his heires males, that this was a fee simple, and that as well the heires females as heires males should inherit, for the grant of a subject shall be taken most strongly against himselfe.

"*Et per ceo il ad fee simple.*" Littleton's reason being shortly collected is this. Whosoever hath an estate of inheritance, hath either a fee simple or a fee taile; but where lands be given to a man and his heires males, he hath no estate taile, and therefore he hath a fee simple.

What actions tenant in taile may have and cannot have, *vide* Sect. 595. What great alterations have been made since Littleton wrote concerning not only leases to be made by tenant in taile, but barres also of the estate taile itselfe by force of certaine acts of parliament made since Littleton's time, you shall read Sect. 56. and 708. (1).

(4) Dy. 116 Hal. MSS.—See further lord Ossulstone's case, 3 Salk. 336. and 11. Mod. 189. See S. C. cited 2. P. Wms. 2. and in Vin. Abr. *Devise* U. b. pl. 2. in marg.

(5) [See Note 156.]

(6) [See Note 157.]

(7) See further as to a qualified fee ante

1. b. and the books cited in n. 5. there.

[27. b.]

(1) By what acts tenant in tail may prejudice his issue or those in remainder or reversion without fine or recovery, and where his acts shall not affect them, see Vin. Ab. *Estate* F. a. to I. a. and Tayle D. E. F.

[r] 2 Co. 1. The Prince's case, 21 E. 3. 4. 22 E. 3. 3. 24 E. 3. 43. 9 H. 6. 25. 9 E. 4. 18. 1. Marie Dier 94. (77. Co. 41.) [u] Per litteras patentes authoritate parliamenti.

(3. Co. 30, 31.)

Mich. 20. & 27. Eliz. in Com. Banco. Leonard Lovelace's case.

[x] 18 Ass. p. 2. 15 E. 3. 46. 6. (Not so in the King's case.) 9 H. 6. 23. 24. 2. S. Co. fol. 1. the Prince's case. Ancient tenures fol. 3.

## CHAP. 3. Sect. 32.

*Tenant in Taile apres Possibilitie d'Issue extinct.*

**T**ENANT en fee taile apres possibilitie d'issue extinct est, lou tenements sont donnez a un home et a sa feme en especiall taile, si l'un de eux devy sans issue, celuy que survesquist est tenant en taile apres possibilitie d'issue extinct. Et s'ils avoient issue, et l'un devie, coment que durant la vie l'issue, celuy que survesquist ne serra dit tenant en taile apres possibilitie d'issue extinct; uncore si l'issue devy sans issue, issint que ne soit aucun issue en vie que poit enheriter per force de le taile, donque celuy que survesquist de les donees est tenant en le taile, apres possibilitie d'issue extinct.

**T**ENANT in fee taile after possibility of issue extinct is, where tenements are given to a man and to his wife in especiall taile, if one of them die without issue, the survivor is tenant in taile after possibility of issue extinct. And if they have issue, and the one die, alboit that during the life of the issue, the survivor shall not be said tenant in taile after possibility of issue extinct; yet if the issue die without issue, so as there be not any issue alive which may inherit by force of the taile, then the surviving party of the donees is tenant in taile, after possibility of issue extinct.

(Dr. and Stud.  
b. 2. c. 1.)

**L**ITTLETON having spoken of estates of inheritance, viz. fee simple and fee taile, now he treateth of tenants of freehold *tantum*, that is, for terme of life, and therein first of tenant in taile after possibility of issue extinct; and he giveth unto him the first place, because this tenant hath eight qualities and priviledges which tenant in taile himselfe hath, and which lessee for life hath not [a.] As first, he is dispunishable for waste (2). Secondly, he shall not be compelled to attorne. Thirdly, he shall not have ayde of him in the reversion. Fourthly, upon his alienation, no writ of entrie *in consimili casu* lyeth. Fifthly, after his death no writ of intrusion doth lie. Sixthly, he may joine the mise in a writ of right, in a speciall manner. Seventhly, in a *precipe* brought by him he shall not name himselfe tenant for life. Eighthly, in a *precipe* brought against him he shall not be named barely tenant for life. (Cro. Eliz. 671.)

And yet he hath four other qualities, which are not agreeable [28. a.] to an estate in taile, but to a bare lessee for life. [b] (1) First, if he maketh a feoffment in fee, this is a forfeiture of his estate (2). Secondly, if an estate in fee, or in fee taile, in reversion, or remainder, descend or come to this tenant, his estate is drowned, and the fee or fee taile executed. Thirdly, he in the reversion or remainder shall be received upon his default, as well as upon bare tenant for life (3). Fourthly, an exchange between a bare tenant for life and him is good, for their estates in respect of their quantity are equal; so as the difference standeth in the quality, and not in

(4. Co. 63.  
1. Ro. Abr. 296.)  
[a] Temps E. 1.  
wast. 126.  
39 E. 3. 10.  
31 E. 3. aid 36.  
48 E. 3. 22.  
48 E. 3. 1.  
48 E. 3. 22.  
28 E. 3. 96.  
46 E. 3. 13. 27.  
2 H. 4. 17.  
7 H. 4. 10.  
11 H. 4. 15.  
21 H. 6. 50.  
10 H. 6. 1.  
26 H. 6. aid 77.  
3 E. 4. 11.  
13 E. 2.  
Entre Cotte 56.  
Fitz. N. B. 203.  
Lewes Bowles' case, 11. Co. fol. 8.  
[b] 13. E. Entre Cong. 56.  
46 E. 3. 22.  
28 E. 3. 96.  
27. Ass. p. 60.  
F. N. B. 160.  
22 E. 3. tit. ag.  
56.  
55 E. 3. 4.  
9 E. 4. 17.  
2 R. 2. receipt 147.  
41 E. 3. 12. 30 E. 3. receipt. 38 E. 3. 33. Lewes Bowles' case ubi supra.

{2} [See Note 158.]

[28. a.]

(1) 43. Ass. 24. Hal. MSS.

(2) So if he mispleads, 39 E. 3. 16. Hal. MSS.

(3) 28 E. 3. 96. Contra as to receipt. Hal. MSS.



in the quantity of the estate. And as an estate taile was originally carved out of a fee simple, so is the estate of this tenant out of an estate in especiall taile. And he is called tenant in taile after possibilitie of issue extinct, because by no possibility he can have any issue inheritable to the same estate taile. But if a man giveth land to a man and his wife, and to the heires of their two bodies, and they live till each of them be an hundred yeeres old, and have no issue, yet do they continue tenant in taile, for that the law seeth no impossibilitie of having children. But when a man and his wife be tenant in especiall taile, and the wife dieth without issue, there the law seeth an apparent impossibility that any issue that the husband can have by any other wife should inherit this estate. And let this tenant keep his estate, for he hath these priviledges in respect of the privity of his estate, and of the inheritance that was once in him.

[c] For in the case of *Evans* (4), *Mich.* 28 & 29 *Eliz.* it was adjudged, that where tenant in taile after possibility of issue extinct granted over his estate to another, that his grantee was compelled to attorne in a *quid juris clamat* (5), as a bare tenant for life, and so be named in the writ; for by the assignment the privity of the estate being altered, the privilege was gone; and this judgement was affirmed in a writ of error, and herewith agreeth 27 *H. 6.* tit. *Aid.* *Statham* 29 *E. 3.* 1. b. (6).

[c] 11. Co. 84.  
83. *Lewes*  
*Bowles' case*  
(Post. 316.)  
27 *H. 6.* tit. *aid.*  
*Statham.*  
29 *E. 3.* 1. b.

27 *H. 6.* tit. *aid.*  
29 *E. 3.* 1. b.

## Sect. 33.

**I**TEM, si tenements sont dones a un home et a ses heires quo il engendra de corps sa feme, en cest cas la feme n'ad ryen en les tenements, et le baron est seisie come donee en speciall taile. Et en ceo cas, si la feme deuy sans issue de son corps engendres per son baron, donques le baron est tenant en taile apres possibilitie d'issue extinct.

**A**LSO, if tenements be given to a man and to his heires which he shall beget on the bodie of his wife, in this case the wife hath nothing in the tenements, and the husband is seised as donee in especiall taile. And in this case, if the wife die without issue of her body begotten by her husband, then the husband is tenant in taile after possibility of issue extinct.

**S**I la feme deoie sans issue." So as the estate of this tenancy must be altered by the act of God, and that by dying without issue; for if a feoffment in fee be made to the use of a man and his wife for terme of their lives, and after to the use of their next issue male to be begotten in taile, and after to the use of the husband and wife, and of the heires of their two bodies begotten, they having no issue male at that time; in this case the husband and wife

*Lewes-Bowles'*  
case, 11. Co.  
84. 80.  
(1. Ro. Rep.  
176. 2. *Samuel*.  
383. 337.  
*Cro. Eliz.* 315.  
1. Co. 76.  
2. Co. 61.)

(4) *M.* 26, 27. *Eliz. B. R. Leon. T.* 29. *Eliz. Clench.* 88. *Evans and Aprichard.* *Hal. MSS.* See *Aprice's case*, 2. *Leon.* 40. 3. *Leon.* 241, which seems to be the case referred to by lord Coke and lord Hale. The anonymous case in 1. *Leon.* 290. and 3. *Leon.* 121. seems also to be the same case.

(5) 28 *E. 3.* 96. *Grantee has the privilege.* *Hal. MSS.* But see the reasons for the judgment cited by lord Coke in the bookes cited in note 4.

(6) *Quære if punishable for waste.* *Hal. MSS.* Sec 2. *Inst.* 302.

wife are tenants in speciall taile executed (7), and after they have issue a sonne, in this case they are become tenants for life, the remainder to the sonne in taile, the remainder to them in speciall taile (8); for albeit their estate taile is turned to an estate for life, yet they have but a bare estate for life; but if the issue die, and the husband die having no other issue, and then the sonne die without issue, the wife shall have the privileges belonging to a tenant in taile after possibility of issue extinct, as it appeareth in *Lewes Bowles'* case *ubi supra*, where it is said, that the state of this tenant must be created by the act of God, and not by limitation of the party, *ex dispositione legis*, and not *ex provisione hominis* [d]. If land be given to a man and to his wife, and to the heires of their two bodies, and after they are divorced *causa præcontractus*, or *consanguinitatis*, or *affinitatis*, their estate of inheritance is turned to a joint estate for life; and albeit they had once an inheritance in them, yet for that the estate is altered by their owne act, and not by the act of God, viz. by the death of either party without issue, they are not tenants in taile after possibility of issue extinct (1). Lands are given to the husband and wife, and to the heires of the body of the husband, the remainder to the husband and wife, and to the heires of their two bodies begotten; the husband dies without issue; the wife shall not be tenant in taile after possibility, for the remainder in speciall taile was utterly void, for that it could never take effect; for so long as the husband should have issue, it should inherit by force of the general taile, and if the husband die without issue, then the speciall estate taile cannot take effect, in as much as the issue, which should inherit the especiall, must be begotten by the husband, and so the generall, which is larger and greater, hath frustrated the especiall which is lesser. And the wife in that case shall be punished for waste.

[d] 7 H. 4. 16.  
5 E. 1. Ass. 415.  
12. Ass. 22.  
19. Ass. p. 2.  
13 E. 3.  
Ass. 91. in fine.  
(9. Co. 100, 141.  
7. Co. 42. b.  
Kenne's case.  
and 4. Co. 29.)

1. Ro. Abr. 641.)

Sect. 34.

**E**T nota, que nul poit estre tenant en le taile apres possibility d'issue extinct, forsque un des donees, ou le donee en le special taile. Car le donee en general taile ne poit estre unque dit tenant en taile apres possibility d'issue extinct; pur ceo que tous temps durant sa vie, il poit per possibility aver issue que poit inheriter per force de mesme le taile. Et issint en mesme le manere l'issue, que est heire a les donees en un especial taile, ne poit estre dit tenant en taile apres possibility d'issue extinct, causa qua supra.

**A**ND note, that none can be tenant in taile after possibility of issue extinct, but one of the donees, or the donee in especial taile. For the donee in generall taile cannot be said to be tenant in taile after possibility of issue extinct; because alwaies during his life, he may by possibility have issue which may inherit by force of the same entaile. And so in the same manner the issue, which is heir to the donees in especial taile, cannot be tenant in taile after possibility of issue extinct, for the reason abovesaid.

Et

And

(7) [See Note 159.]  
(8) [See Note 160.]

[28. b.]  
(1) [See Note 161.]

\*Et nota, que tenant en taile apres possibilitie d'issue extinct ne serra unque puny de wast, pur l'inheritance que fuit un foits en luy, 10 H. 6. 1. Mes cestuy en le reversion poit entrer s'il alien en fee, 45 E. 3. 22.

And note, that tenant in taile after possibility of issue extinct shall not be punished of waste, for the inheritance that once was in him, 10 H. 6. 1. But he in the reversion may enter if he alien in fee, 45 E. 3. 22.

**I**F lands be given to a man with a woman in frankmarriage, albeit the woman (which was the cause of the gift) dieth without issue, yet the husband shall be tenant in taile apres possibilitie, &c. for that he and his wife were donees in especiall taile, and so within the words of *Littleton*. The residue of this Section is evident.

\* This, and that which follows, is not in the first (2) edition (which I have). And therefore (that I may speake it once for all), it was wrong to the authour to adde any thing (especially in one context) to his worke.

(Dr. and Stud.  
61. 11. Co. 80.)

## [29. a.] CHAP. 4.

## Curtesie d'Engleterre.

## Sect. 35.

**T**ENANT per la curtesie d'Engleterre est, lou home prent feme seisie en fee simple ou en fee taile general, ou seisie come heire de le taile special, et ad issue per mesme la feme male ou female oyes ou vife (1), soit l'issue apres mort ou en vie, si la feme devie, le baron tiendra la terre durant sa vie per la ley d'Engleterre. Et est appel tenant per le curtesie d'Engleterre, pur ceo que ceo est use en nul auler realme forsque tantsolement en Engleterre.

Et ascuns ont dit, que il ne serra tenant per le curtesie, si non que l'enfant, qu'il ad per sa feme, soit oye erie; car per le erie est prove, que le enfant fuit nee vife: Ideo Quære (2.)

**T**ENANT by the curtesie of Eng-land is, where a man taketh a wife seised in fee simple or in fee taile generall, or seised as heir in taile especiall, and hath issue by the same wife male or female borne alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesie of England, because this is used in no other realme but in England onely.

And some have said, that he shall not be tenant by the curtesie, unlesse the childe, which he hath by his wife, be heard erie; for by the erie it is proved, that the childe was born alive. Therefore Quære.

“PRIST

(2) By the first edition, lord Coke means that printed at *Rohan*, as appears by the preface to this his Commentary on *Littleton*. But the edition of *Leitou* and *Machlinia*, which was really the first, is also without the addition here mentioned. It appears to have been first introduced into the edition by *Redman*.—See further as to the subject of *tenant in tail after possibility*. Vin. Abr.

*Taile*. l.

[29. a.]

(1) Instead of *oyes ou vife*, the words are *neez vife* in L. and M. This latter reading is conformable to lord Coke's translation.

(2) This *quære* is in L. and M. but not in *Roh*.

"**P**RIST *feme seisin*." And first of what seisin a man shall be tenant by the curtesie. [c] There is in law a twofold seisin, viz. a seisin in deed, and a seisin in law, whereof more shall be said Sect. 468, and 681. And here *Littleton* intendeth a seisin in deed, if it may be attained unto. [f] As if a man dieth seised of lands in fee simple or fee taile generall, and these lands descend to his daughter, and she taketh a husband and hath issue, and dyeth before any entry, the husband shall not be tenant by the curtesie, and yet in this case she had a seisin in law; but if she or her husband had during her life entred, he should have been tenant by the curtesie (3). [g] A man seised of an advowson (4) or rent in fee hath issue a daughter, who is married, and hath issue, and dieth seised, the wife, before the rent became due or the church became voyd, dieth, she had but a seisin in law, and yet he shall be tenant by the curtesie, because he could by no industry attaine to any other seisin. *Et impotentia excusat legem* (5). But a man shall not be tenant by the curtesie of a bare right, title, use (6), or of a reversion (7) or remainder expectant upon any estate of freehold, unless the particular estate be determined or ended during the coverture.

At the coronation of king R. 2. saith the record, [h] *Johannes rex Castiliæ et Legionis, Dux Lancastrie, coram dicto domino rege et consilio suo comparens, clamavit ut comes Leicestrie officium Seneschalcie Angliæ, et ut dux Lancastrie ad gerendum principalem gladium domini regis vocat' Curtana die coronationis ejusdem regis, et ut comes Lincoln' ad sciendum et secundum coram ipso domino rege sedente ad mensam dicto die coronationis; et quia fact' diligenti examinatione coram peritis de consilio regis de premissis, satis constabat eidem consilio, quod ad ipsum ducem tanquam tenentem per legem Angliæ post mortem Blanchie quamdam uxoris sue pertinuis officia predict' prout superius clamabat exercere, consideratum fuit per ipsum regem et consilium suum predictum quod idem dux officia predicta per se et sufficientes deputatos suos faceret, et exerceret, et fioda debita in hac parte obtineret. Qui quidem dux officium Seneschalcie predict' personaliter adimplevit, &c.* And every [29. b.] man that claimed to hold by grand serjanty to do any service to the king at his coronation, exhibited his petition to the said duke as steward of *England*, who upon hearing the proofes either allowed or disallowed the same.

In letters patents made by king H. 6. to *Richard earle of Salisbury* you shall finde this clause, *Quod charissimus consanguineus noster Richardus, nunc comes Sarum, qui Aliciam filiam et heredem Thomæ nuper comitis Sarum adhuc superstitem duxit in uxorem, et eum eadem Aliciâ prolem tempore mortis predictæ Thomæ habuit et habet superstitem de presenti, eoque prætextu idem Richardus nunc comes Sarum nomen statum et honorem comitis Sarum, &c. habet, et pro tempore vite sue de jure prætextu præmissorum habere debet* (1). The name of the issue which the said *Richard earle of Salisbury* had by the said *Alice* was *Richard*, who married with *Anne* the sister and heire of *Henry Beauchamp earle of Warwick*, who was earle of *Warwicke* to him and to his heires, and duke of *Warwicke* to him

[c] F. N. B. 194.  
(Post. 163.)

[f] 1. Mar.  
per 55.

(Post. 60.)  
[g] 7 E. 3. 66.  
3 H. 7. 2.  
(6. Cr. 68. a.  
1. Co. 97. b.  
2. Co. 34.  
Ante 16. b.)  
(9. Co. 96.)

[h] Process. Patet.  
ad Coronationem  
R. 2. Anno regni  
sui primo. Ret.  
claus. m. 46.

Ret. Patent. ann.  
29 H. 6.

Ret. Patent. de  
anno 27. H. 6. m.

(3) [See Note 162.]

(4) [See Note 163.]

(5) [See Note 164.]

(6) [See Note 165.]

(7) [See Note 166.]

[29. b.]

(1) [See Note 167.]

him and to the heires males of his body. And *Richard* the sonne having then no issue by his wife, king *H.* 6. in 27. yeare of his raigne granted to him that he should be earle of *Warwicke*, *licet ipse et predicta Anna exitum inter eos ad præsens non habent*. These and many more I have read concerning this matter, and only say to the reader, *Utere tuo iudicio, nihil enim impedit*.

[i] If an estate of freehold in seigniories, rents, commons, or such like be suspended, a man shall not be tenant by the curtesie; but if the suspension be but for yeares, he shall be tenant by the curtesie. As if a tenant make a lease for life of the tenancie to the seignioresse, who taketh a husband, and hath issue, the wife dieth, he shall not be tenant by the curtesie (2), but if the lease had been made but for yeares he shall be tenant by the curtesie.

*“En fee simple ou en fee taile generall, ou scisie come heire de la taile speciall, et ad issue per la femme male ou female.”* 2. Of what estate. If lands be given to a woman and to the heires males of her body, she taketh a husband and hath issue a daughter and dieth, he shall not be tenant by the curtesie; because the daughter by no possibilitie could inherite the mother's estate in the land; and therefore where *Littleton* saith, issue by his wife male or female, it is to be understood, which by possibility may inherit as heir to her mother of such estate. *Littleton* himself explaneth this by expresse words Cap. Dower fo. 40. Sect. 52. And therefore if a woman tenant in taile generall maketh a feoffment in fee, and taketh back an estate in fee, and take a husband and hath issue, and the wife dieth, the issue may in a *formedon* recover the land against his father, because he is to recover by force of the estate taile as heir to his mother, and is not inheritable to his father (3).

*“Et ad issue.”* 3. The time of having the issue. 4. What kinde of issue. If a man seised of lands in fee hath issue a daughter, who taketh husband and hath issue, the father dieth, the husband enters, he [a] shall be tenant by the curtesie, albeit the issue was had before the wife was seised. And so it is albeit the issue had dyed in the life-time of her father before any descent of the land, yet shall he be tenant by the curtesie (4). If a woman [b] seised of lands in fee taketh husband, and by him is bigge with childe, and in her travell dyeth, and the childe is ripped out of her body alive, yet shall he not be tenant by the curtesie, because the childe was not borne during the marriage, nor in the life of the wife, but in the meane time her land descended, and in pleading he must alledge, that he had issue during the marriage.

If the wife be [c] delivered of a monster, which hath not the shape of mankinde, this is no issue in the law; but although the issue hath some deformity in any part of his body, yet if he hath humane shape this sufficeth. *Hi, qui contra formam humani generis converso more procreantur, (ut simulier monstrosum vel prodigiosum fuerit enixa) inter liberos non computentur. Partus tamen cui natura aliquantulum ampliaverit vel diminuerit non tamen superabundanter, ut si sex digitos vel nisi quatuor habuerit, bene debet inter liberos commemorari. Si inutilia natura reddidit membra, ut si curvus*

[i] Vid. 1 E. 3. 6.  
5 E. 3. 26.  
(Post. 30.)

W. 2. ca. 1.  
Litt. ca. Dower  
fol. 40. sect. 52.  
Paine's case.  
8. Co. fol. 34.

[a] Old Tenures  
21 H. 3. tit.  
Dower 198.

[b] Vide Paine's  
case, ubi supra.

[c] Braet. lib. 5.  
437, 438.  
Britt. ca. 66.  
and ca. 83.  
Fieta, lib. 1.  
c. 5. and lib. 6.  
cap. 54.  
(Ante J. b.  
7. b. 2. a.)

(2) [See Note 168.]

(3) [See Note 169.]

(4) Yet in some cases the time of having issue is of consequence. See post. 40.

*curvus fuerit aut gibbosus vel membra tortuosq habuerit, non tamen est partus monstrosus. Item pucrorum alii sunt masculi, alii femina, alii hermaphrodita. Hermaphrodita tam masculo quam femina comparatur secundum prævalentiam sexus incalascens.*

If the issue be born deaf or dumbe or both, or be born an ideot, yet it is a lawful issue to make the husband tenant by the curtesie and to inherit the land.

[d] 28 H. 8.  
25. Dyer.  
Paine's case, ubi  
supra.

"*Oyes ou vive.*" If it be borne alive [d] it is sufficient, though it be not heard cry; for peradventure it may be born dumbe. And this is resolved cleerly in Paine's case *ubi supra*. For the pleading (as hath beene said) is, that during the marriage he had issue by his wife, and upon that point the triall is to be had, and upon the evidence (5) it must be proved, that the issue was alive, for *mortuus exitus non est exitus*, so as the crying is but a prooffe that the childe was born alive, and so is motion, stirring, and the like. And it is said by an ancient author [e] that it was ordained in the raigne of king H. 1. *Que tous que survequissent leur fems dount ils usent conceive tenuissent les heritages leur fems pur leur vies.* [30. a.]

[e] Mirres, esp.  
1. sect. 3.

By the custom of Gavelkind [f] a man may be tenant by the curtesie without having of any issue (1).

[f] 9 H. 3. 38.  
16 E. 3. aid. 130.  
Stat. de Consuetu-  
dinibus Rancie.

"*Soit l'issue apres mort ou en vie.*" And therefore [g] if a woman tenant in taile generall taketh a husband, and hath issue, which issue dyeth, and the wife dieth without any other issue, yet the husband shall be tenant by the curtesie, albeit the estate in taile be determined, because he was intituled to be tenant *per legem Angliæ* before the estate in taile was spent, and for that the land remaineth. But if a woman maketh a gift in taile, and reserve a rent to her and to her heires, and the donor taketh a husband and hath issue, and the donee dieth without issue, the wife dieth, the husband shall not be tenant by the curtesie of the rent, for that the rent newly reserved is by the act of God determined, and no state thereof remaineth. But [h] if a man be seised in fee of a rent and maketh a gift in taile generall to a woman, she taketh husband and hath issue, the issue dieth, the wife dieth without issue, he shall be tenant by the curtesie of the rent, because the rent remaineth (2). The diversity appeareth.

[g] 21 H. 3.  
tit. Dower 198.  
Paine's case, ubi  
supra.  
(4. Lepn. 167.)

(Foot. 32. a.)  
[h] Brooke tit. pay  
to Curtesie 66.  
19 E. 3. 27.

"*Si la feme devie, le baron tiendra a la terre, &c.*" Four things doe belong to an estate of tenancy by the curtesie, viz. marriage, seisin of the wife, issue, and death of the wife. But it is not requisite that these should concur together all at one time. And therefore, if a man taketh a woman seised of lands in fee, and is disseised, and then have issue, and the wife die, he shall enter and hold by the curtesie. So if he hath issue which dieth before the descent, as is aforesaid.

And albeit the state be not consummate untill the death of the wife, yet the state hath such a beginning after issue had in the life of the wife as is respected in law for divers purposes.

First, after issue had, he shall doe homage alone, and is become tenant to the lord, and the avowrie shall be made onely upon the husband

[30. a.]

(5) [See Note 170.]

(1) [See Note 171.]  
(2) [See Note 172.]

husband in the life of the wife, as shall be said hereafter when we come to the apt place (3). Secondly, if after issue [i] the husband maketh a feoffment in fee, and the wife dieth, the feoffee shall hold it during the life of the husband, and the heire of the wife shall not during his life recover it in *sur cui in vita*; for it could not be a forfeiture, for that the estate, at the time of the feoffment, was an estate of tenancy by the curtesie initiate (4) and not consummate. And it is adjudged in 29 E. 3. that the tenant by the curtesie cannot claime by a devise, and waive the state of his tenancy by the curtesie, because, saith the booke, the freehold commenced in him before the devise for terme of his life.

(5. Co. 57. b. Post. 67. a. 124. b.)  
[i] 34 E. 3. Cui in vita 13.  
2 E. 2. Cui in vita 36.  
10 E. 3. 12. Dier 21.  
Elix. 363.  
29 E. 3. 2. 87.

*"Et est appelle tenant per le curtesie d'Engleterre, pur ceo que n'est use en auter realme forsque tantolement en Engleterre."*

*"Per le curtesie."* In Latine *per legem Angliæ*.

*"Tantolement en Engleterre."* It is also used within the realme of Scotland, and there it is called *Curialitis Scotiæ*. And so it is in the realme of Ireland (5).

*"Et ascuns ount dit, que il ne serra tenant per le curtesie, sinon que l'enfant que il ad per sa feme soit oye crie, car per le crie est prove que le enfant fuil nee vife."* Our author having delivered his owne opinion before, viz. *oye ou vife*, now he sheweth the opinions of others: for so is said in the [k] statute *De tenentibus per legem Angliæ*: and of that opinion is Glanvill [l] lib. 7. cap. 8. Bracton lib. 5. tract. 5. cap. 30. Britton cap. 50. fol. 132. Fleta lib. 6. cap. 50. &c. But the reason is against their opinion; for by the cry it is proved, &c. so as it is but an evidence to prove the life of the enfant.

(8. Co. 34.)

[k] Vet. Mag. Car. part. 2. fol. 70.  
[l] Glanvill. lib. 7. cap. 8.  
Bract. lib. 5. tract. 5. ca. 30.  
Britton, cap. 50. fo. 132.  
Fleta, lib. 6. cap. 54.

*"Ascuns ount dit."* By these and the like speeches our author intendeth, that the point had been controverted, but thereby, except it be in this Section, where formerly he delivered his opinion, as hath been said, he tacitely insinuateth his owne judgement, which in all the rest holdeth for good law and warranted by good authority throughout his three bookes; which kinde of speech and the like I have collected together, as it appeareth by the Sections in [m] the margent.

[m] Sect. 40. 116. 132. 136. 137. 138. 141. 145. 148. 156. 176.

179. 192. 202. 237. 234. 369. 336. 339. 387. 400. 438. 436. 440. 443. 460. 402. 478. 501. 503. 806. 525. 523. 524. 534. 576. 601. 633. 634. 640. 642. 643. 644. 646. 658. 678. 689. 721. 723. 726. 730. 731. 733. 734.

*"Ideo quære."* This quære is not in the originall edition of *Lit-tleton*, and therefore to be rejected (6).

And some have said, that in divers cases a man shall by having of issue be tenant by the curtesie where a woman shall not be endowed. And therefore they say, if lands be given to two women and to the heires of their two bodies begotten, and one of them take

(2. Ro. Abr. 90. & Post. 183. contra.)

(3) Hic sect. 90. 21 E. 3. 35. Hal. MSS.

(4) [See Note 173.]

(5) [See Note 174.]

(6) It appears by the various reading already given, that this quære, though not in the Ro-

man edition, which lord Coke thought the oldest, is in that by *Lettou* and *Machlinia*, which is really the original one. [But see editor's preface to the present edition.]

7 E. 3. 4.  
[a] 17 E. 3. 61.

Prærog. Regis,  
ca. 13.

33 E. 3. the  
Travers 36.  
(4. Co. 88.  
1. Leon. 47.)

[u] Pl. Com.  
Daine Hales' case  
263.  
(9. Co. 129.)

[o] Magna Carta  
30 E. 1. Dower  
81. 17 H. 3.  
Dower Bract.  
lib. 2. fol. 46.  
& 314.  
(Post. 32. a.  
Chro. Cha. 300.  
1. Ro. Abr. 675.)  
[p] 4 H. 3.  
dower 180.  
Bract. fol. 93.  
Fleta, lib. 5.  
cap. 23.  
2 E. 3. dower  
123. 3 E. 3.  
dower 102.  
6 H. 7. 1.  
30 E. 3.  
Hob. 338.  
(Post. 278.)

take husband and have issue and die, the inheritances being severall the husband shall be tenant by the curtesie, as it is adjudged 7 E. 3. and in other bookes [r] this judgment is cited and allowed. But certaine it is, that if land be given to two men and to the heires of their two bodies begotten, and the one taketh wife and dieth, she shall not be endowed, for no estate in the land is altered by that marriage. But I leave the reader to his owne opinion, or rather to suspend it until he come to the proper place in the next chapter. If lands holden of the king by knight's service in [30. b.] *capite* descend to a woman, and after office found she intrude and taketh husband and hath issue, in this case the husband shall be tenant by the curtesie (1); and yet if the heire male after office in the like case intrudeth and taketh wife, his wife shall not be endowed, for so it is provided by the statute of *Prærogativa Regis*, cap. 13. that in that case there accrues to the heire no freehold, nor dower to the wife, which by interpretation is as much as to say, that the heire shall have no freehold as to this respect to give any dower to his wife. If a man marry the niece of the king by licence and hath issue by her, and after lands descend to the niece and the husband enter, the niece dieth, he shall be tenant by the curtesie of this land, and the king upon any office found shall not evict it from him, because by the marriage the niece was infranchised during the coverture. But if a free woman marry the villaine of the king by licence, and lands descend to the villaine, the villaine dieth, the wife shall not be endowed, but upon an office found the king shall have the land, for the villaine remained still a villaine to the king. A woman [r] taketh husband, and hath issue, lands descend to the wife, the husband enters, and after the wife is found an ideot by office, the lands shall be seized by the king (2), for the title of the tenancy by the curtesie and of the king begin at one instant, and the title of the king shall be preferred. A man shall be tenant by the curtesie of a castle [o] which serveth for the publicke defence of the realme, but a woman shall not be endowed thereof, as shall be said more at large hereafter (3).

A man shall be tenant by the curtesie of a common *saune nomber*, but a woman shall not be endowed thereof, because it cannot be divided. A man shall be tenant by the curtesie [h] of a house that is *Caput Baronie* or *Comitatûs*: (4) but it appeareth by 4 H. 3. Dower 180. that a woman shall not be endowed of it. For the law respecteth honour and order, A man is entitled to be tenant by the curtesie, and maketh a feoffment in fee upon condition, and entreth for the condition broken, and then his wife dieth, he shall not be tenant by the curtesie, because albeit the state given by the feoffment be conditionall, yet his title to be tenant by the curtesie was inclusively absolutely extinct by the feoffment, for the condition was not annexed to it (5). As if the lord disseise the tenant, and maketh a feoffment in fee of the land upon condition, and entreth for the condition broken, yet the seigniori is extinct, for that was inclusively extinct by the feoffment. See more of tenant by curtesie, Section 52 (6).

(1) 1 H. 7. 17. Dy. 95. Hal. MSS.  
(2) [See Note 175.]  
(3) [See post. 31. b.]  
(4) [See Note 176.]

(5) Ric. fol. 266. Hal. MSS.  
(6) See also Wright's Ten. 193. and Vin. Abr. *Curtesy*, and the same title New Abr.



## CHAP. 5.

## Of Dower.

## Sect. 36.

**T**ENANT en dower est, lou home est seisié de certaine terres ou tenements en fee simple, taile generall, ou come héire de le taile speciall, et prent feme, et devie, la feme apres le decease de la baron serra endow de la tierce part de tiels terres et tenements, que fueront a su baron en ascun temps durant le coverture, a aver et tener a mesme la feme en severallie per metes et bounds pur terme de sa vie, le quel el avoit issue per su baron ou nemy, et de quel age que la feme soit, issint que el passe l'age de neuf ans al temps de le mort sa baron, [car il covient que el soit passe l'age de neuf ans al temps del mort sa baron, (1) ou auterment el ne serra my endow.]

**T**ENANT in dower is, where a man is seised of certaine lands or tenements in fee simple, fee taile generall, or as héire in speciall taile, and taketh a wife, and dieth, the wife after the decease of her husband shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty by metes and bounds for terme of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine yeares at the time of the death of her husband, for she must be above nine yeares old at the time of the decease of her husband, otherwise she shall not be endowed.

**"TENANT en dower."** (7) *Tenens in dote.* Dos, dower, in the common law [q] is taken for that portion of lands or tenements which the wife hath for terme of her life of the lands or tenements of her husband after his decease, for the sustenance of herself, and the nurture and education of her children (8). *Propter onus matrimonii, et ad sustentationem uxoris et educationem liberorum cum fuerint procreati si vir premoriatur: et hoc proprie dicitur dos mulieris secundum consuetudinem Anglicanam.* And dos is derived *ex donatione, et est quasi donarium*, because either the

[31. a.] law itselfe doth (without any gift) or the husband himself giveth it to her, as shall be said hereafter. And at this day dos or dower is not taken by the professors of the common law, either for the land which the wife bringeth with her in marriage to her husband, for then, it is either called in frankmarriage or in marriage, as hath beene said, nor for the portion of money or other goods or chattels which she bringeth with her in marriage, for that is called her marriage portion. And yet of ancient time [r] *dos mulieris*, the dower or dowrie of the woman was also applyed to them. But it is commonly taken for her third part, which she hath of her husband's lands or tenements.

In Domesday, Dos is called *Maritagium*.

To the consummation of this dower three things are necessary, viz. marriage, seisin, and the death of her husband.

Dos [s], the very name doth import a freedome, for the law doth give her therewith many freedomes. *Secundum consuetudinem regni mulieres vidue, &c. debent esse quiete de tallagiis, &c.* And tenant

[q] Lib. Rub. cap. 70.  
Glanvill. lib. 6. cap. 1.  
Bract. lib. 2. fol. 92.  
Britt. cap. 101.  
Fleta, lib. 5. cap. 22.

[r] Bleton, cap. 101.  
Bracton, lib. 2. fol. 92.  
Glanv. lib. 6. ca. 1. lib. 7. ca. 2. Co. 93.  
Bingham's case. 1 H. 3. dower 179.

[s] Claus. 21 H. 3. nu. 17.  
Regist. 143, 143.  
F. N. B. 150.  
Ockham fol. 40.

(7) [See Note 177.]

(8) [See Note 178.]

(1) All between the brackets omitted in L. and M. and in Rob.

nant in dower shall not be distreyned for the debt due to the king by the husband in his life time in the lands which she held in dower. And other privileges she hath; of all which *Ockam* yeelds the reason, *Doti ejus parcaturquis premium pudoris est* (2).

"*Lou home.*" If the husband be an *lien* [r] the wife shall not be endowed. So if the husband be the king's villaine, the wife shall not be endowed (as hath beene said); but if the husband be a villaine to a common person, the wife shall be endowed if she be intitled to dower before the entrie of the lord. And so if a free man take a niese to wife and dieth, she shall be endowed. The wife of an ideot (3), *non compos mentis*, outlawed, or attainted of felony or trespass, attainted of heresie, *præmunire*, or the like, shall be endowed. But if the husband be attainted of treason, albeit it be treason done after the title of dower, she shall not be endowed, as shall be said hereafter.

"*Seisie.*" Here this word (seised) extendeth itselfe as well to a seisin in law, or a civill seisin, as to a seisin in deed, which is a naturall seisin: but seised he must be either the one way or the other during (4) the coverture. For a woman shall be endowed of a seisin in law. As where lands or tenements descend to the husband, before entry, he hath but a seisin in law, and yet the wife shall be endowed, albeit it be not reduced to an actuall possession, for it lieth not in the power of the wife to bring it to an actuall seisin, as the husband may do of his wife's land, when he is to be tenant by curtesie, which is worthy the observation. And yet of every seisin in law, or actuall seisin of lands or tenements, a woman shall not be endowed. For example, if there be grandfather, father, and sonne, and the grandfather is seised of three acres of land in fee, and taketh wife and dieth, this land descendeth to the father, who dieth either before or after entry, now is the wife of the father dowable. The father dieth, and the wife of the grandfather is endowed of one acre and dieth, the wife of the father shall be endowed onely of the two acres residue, for the dower of the grandmother is paramount the title of the wife of the father, and the seisin of the father which descended to him (be it in law or actuall) is defeated (5), and now upon the matter the father had but a reversion expectant upon a freehold, and in that case, *Dos de dote peti non debet*; although the wife of the grandfather dieth living the father's wife (6). And here note a diversity [w] betweene a descent and a purchase. For in the case aforesaid, if the grandfather had infeofed the father, or made a gift in taile unto him, there in the case abovesaid, the wife of the father, after the decease of the grandfather's wife, should have been endowed of that part assigned to the grandmother, and the reason of this diversitie is, for that the [31.b.] seisin, that descended after the decease of the grandfather to the father, is avoyded by the indowment of the grandmother, whose title was consummate by the death of the grandfather; but in the case of the purchase or gift, that took effect in the life of the grandfather (before the title of dower of the grandmother was consummate), is not

[r] *Bract. fol.*  
364. 19 E. 2.  
dower 171.  
Dame Hales'  
case. 13 E. 3.  
dower Statham.  
13 E. 1. tit.  
Dower.  
(Post. 392. b.)

(Ante 30. a.)

[n] 43 E. 3. 32.  
45 E. 3. 13.  
5 E. 3. 4.  
F. N. B. 149.  
3 E. 3. tit.  
Ass. 303.  
19 E. 2.  
dower 170.  
23 E. 3.  
dower 30.  
(*Park. sect. 316.*  
316. 4. Co. 122.  
1. Ro. Abr. 677.)

[w] 5 E. 3. tit.  
Voucher 349.  
Paris's case  
8 E. 3. 4.

(4. Co. 123.)

(2) [See Note 179.]

(3) See ante 30. b. n. 2.

(4) [See Note 180.]

(5) *Hic sect. 8.* 8 E. 3. 13. 8. Ass. 6.

*But by some the heir shall have moridancester  
of such seisin.* Hal. MSS.

(6) [See Note 181.]

not defeated, but only *quoad* the grandmother, and in that case there shall be *Dos de dote*. And yet there is another diversitie [x] (1) where the wife of the father is first endowed, and where the wife of the grandfather; for in the same case after the decease of the grandfather and father the sonne entreth and indoweth his mother of a third part, against whom the grandmother recovereth a third part and dyeth, the mother shall enter againe into the land recovered by the grandmother, because she had in it an estate for terme of her life, and the estate for the life of the grandmother is lesser in the eye of the law, as to her then her owne life. Also the husband [y] (2) may be seised in his demesne, as of fee absolutely, yet the woman shall not be indowed; as she shall not be indowed both of the land given in exchange, and of the land taken in exchange, and yet the husband was seised of both, but she may have her election to be indowed of which she will.

Also of a seisin for an instant a woman shall not be indowed (3); as if *Cestuy que use* [z] after the statute of 1 R. 3. and before the statute of 27 H. 8. had made a feoffment in fee, his wife should not be indowed (3. a.)

Likewise if two joynttenants be in fee, and the one maketh a feoffment in fee, his wife shall not be indowed (4). And so if the conusee of a fine doth grant and render the land to the conusor, the wife of the conusee shall not be indowed, for it is not possible that the husband could have indowed his wife of such an estate, as the usual pleading is, *Lib. intrat. 225. Quid dicit quod W. quondam vir suus nunquam fuit seistus de tenementis predictis de tali statu ita quod eandem A. inde dotasse potuit.*

"*Dea terres ou tenements.*" Of a castle that is maintained for the necessary defence of the realme a woman shall not be indowed, because it ought not to be divided, and the publique shall be preferred before the private (5). But of a castle that is onely maintained for the private use and habitation of the owner; a woman shall be indowed. And so it was adjudged in the court of [a] common pleas, where in a writ of dower the demand was; *de tertia parte Castri de Hilderker in Comitatu Northumb.* And the statute of *Magna Charta*, cap. 7. whereby it is provided; *nisi domus illa sit Castrum*, is to be understood, a castle maintained for the necessary and publike defence of the realme. And this agreeth with ancient records, [b] (albeit in the argument of the said case they were not vouched) the effect whereof be, *Non debent mulieribus assignari in dotem castra que fuerunt virorum suorum et que de guerra existunt, vel etiam homagia et servitia aliquorum de guerra existentia.* Wherein it is to be observed, that the law is not satisfied with the names of things, or nominatives, but with things reall and substantial. But of the principal mansion, or capitall messuage, the wife shall be indowed, [c] *si non sit*

[x] 6 E. 3. 66.  
Ass. 393.  
13 R. 2.  
Dower 46.  
23 E. 3. 4.  
8 E. 3. 3.  
7 H. 6. 4.  
(Post. 42. a.)  
4 Co. 123.)

[y] 6 E. 3. 30.  
F. N. B. 149.  
(Cro. Cha. 190.  
191. 1. Ro.  
Abr. 676. 474.  
Cro. Jam. 615.  
Doctr. Plac. 148.  
2 Co. 77.)

[z] 27 H. 8. 23.  
F. N. B.  
17 H. 3.  
Dower 192.

Vide Sect. 342.  
(Post. 106. d.)  
Ante 30. b.)

[a] Pasch.  
23. E. 3. in Com.  
Banco. Bract.  
fol. 96.  
Brit. ca. 103.  
Flet. 1. 8. c. 23.  
30 E. 1. tit.  
Dower 81. b.  
30 E. 1.  
Vouch. 398.  
17 H. 3.  
Dower 192.  
8 H. 3.  
Dower 196.  
8 H. 3. lib. 194.  
[b] Pat. 1 E. 1.  
part. 1. m. 17.  
Rsch. 4 E. 1. m.  
88.  
[c] Bract. 1. 2. c.  
93.  
Brit. c. 103.  
Flet. lib. 6. ca. 22.  
Com. Banco.

Trim. 17. H. 18. in

(1) 8 E. 2. *Recovery in value* 10. Hal. MSS.

(2) Hic sect. 56. fol. 42. Hal. MSS.

(3) [See Note 182.]

(3a) [See Note 183.]

(4) 8. p. acc. in MSS. *Common Place-book*, supposed to be by judge *Doderidge*, and 14 H.

4. 13. E. and P. 34 E. 1. Fitzh. Dower 178. cited.—See further Cro. Eliz. 502. Noy 64. Cro. Jam. 615. 1. Atk. 442 and 2. Blackst. Comment. 132.

(5) [See Note 184.]

*sit Caput Comitatus, sive Baronie* (6), for the honour of the realme, or (as hath beene said) a castle for the publike defence of the realme. And so are the old bookes to be intended, as it was resolved *Tr. 17 Eliz.* in the court of common pleas, which I heard and observed. And of an estate taile in lands determined, a woman shall be indowed in the like manner and forme as a man shall be tenant by the curtesie, *mutatis mutandis*.

“*En fee simple, fee taile general, &c.*” If a man be tenant in fee taile generall, [*d*] and make a feoffment in fee, and taketh back an estate to him and to his wife, and to the heires of their two-bodies, and they have issue, and the wife dyeth, the husband taketh another wife and dyeth, the wife shall not be endowed, for during the coverture he was seised of an estate taile speciall, and yet the issue which the second wife may have by possibilitie may inherit (7).

The same law it is, if in this case he had taken backe an estate in fee simple, and after had taken wife and had issue by her; yet she shall not be indowed, for that the fee simple is vanished by the remitter, and her issue hath the land by force of the entaile. But in that case the tenant cannot plead that the husband was never seised of such an estate whereof the demandant might be indowed, but he must plead the speciall matter (8).

“*Et prent feme.*” If a man so seised as is aforesaid, taketh an alien to wife, and dyeth, she shall not be endowed (9); but if the king take an alien borne, and dyeth, she shall be indowed by the law of the crowne. And *Edmond* the brother of king *Edward* the first, married the queen of *Navarre*, and dyed, and it was resolved [*e*] by all the judges, that she should be indowed of the third part of all the lands whereof her husband was seised in fee (10).

If a *Jew* born in *England* taketh to wife a *Jew* borne also in *England*, the husband is converted to the Christian faith, purchaseth lands, and infeoffeth another, and dyeth, the wife brought a writ of dower, and was barred of her dower, and the reason [32. a.] yielded in the record [*f*] is this, *Quia verò contra justitiam est quòd ipsa dotem petat vel habeat de tenemento quod fuit viri sui, ex quo in conversione suâ noluit cum eo adherere et cum eo converti* (1).

“*Del tierce part de tiels terres et tenements per severallie per metes et bounds.*” Albeit of many inheritances that be entire, whereof no division can be made by metes and bounds, a woman cannot be endowed of the thing itselfe, yet a woman [*g*] shall be endowed thereof in a speciall and certaine manner. As of a mill a woman shall not be endowed by metes and bounds, nor in common with the heire, but either she may be endowed of the thirde tolle dish, or *de integro molendino per quicquidet 3. mensum.* And so of a villeine, [*h*] either

[*d*] 41 E. 3. 30.  
44 E. 3. 26.  
30 H. 8. Dyer  
41.

30 H. 8.  
Dyer 41.

(Doct. Plac.  
148. Post. 33. a.)

[*e*] Rot. Parl.  
25 E. 3. Rot. 1.

[*f*] Dora. claus.  
18 H. 3. m. 17.

(1. Ro. Abr.  
682.)

[*g*] Bract. lib. 2.  
fo. 97. b.  
23 H. 3. tit.  
Ass. 43f.  
E. N. B. 140.  
44 E. 3.  
Dower 50.  
(Post. 165. a.)  
[*A*] 2 H. 6. 11.  
Bract. lib. 2. fo. 97.  
Brit. 247. 11 E. 3. tit. Dower 85. 12 E. 3. ibid. 81. 2 E. 3. 57. F. N. B. 8. k.

(6) [See Note 185.]

(7) [See Note 186.]

(8) 21 E. 3. 36. 3 H. 6. 55. Hal. MSS.

(9) [See Note 187.]

(10) Yet Edmund the queen of *Navarre's* husband was only a subject, therefore *quære* the reason of the case.

[32. a.]

(1) Nota placitum illud fuit coram justiciariis ad custodiam Judicorum assignatis. Hal. MSS.—See the record at length in *Tov. Angl. Judaic.* 230. See also *Mol. de Jur. Marit.* 8th ed. b. 3. c. 6. s. 11.

either the third dayes work, or everie third weeke or month. A woman shall be endowed of the third part of the profit of stallage, of the third part of the profits of a faire, of the third part of the profits of the office of marshalse, of the [i] third part of the profits of the keeping of a parke, of the third part of the profit of a dove-house, and likewise of the third part of a piscary, [k] viz. *tertium piscem, vel jactum retis tertium*; of the third presentation to an advowson (2). A writ of dower lieth *de 3. parte exituum provenientium de custodiâ gaule Abathie Westm.* And herewith agreeth reverend antiquitie. *De [l] nullo, quod est suâ naturâ indivisible et sectionem sive divisionem non patitur, nullam partem habebit, sed satisfaciât ei ad valentiam.* Of the third part of profits of courts, [m] fines, heriots, &c. Also a woman shall be endowed of tithes; and the surest indowment of tithes is of the third sheafe; for what land shall be sowne is uncertaine (3).

But in some cases of lands and tenements, which are divisible, and which the heire of the husband shall inherit, yet the wife shall not be endowed. As if the husband [n] maketh a lease for life of certaine lands, reserving a rent to him and his heires, and he taketh wife and dieth, the wife shall not be endowed, neither of the reversion (albeit it is within this word tenements) because there was no seisin in deed or in law of the freehold nor of the rent, because the husband had but a particular estate therein, and no fee simple (4). But if the husband maketh a lease for yeares, reserving a rent, and taketh wife, the husband dieth, the wife shall be endowed of the third part of the reversion by metes and bounds, together with the third part of the rent, and execution shall not cease during the yeares (5). And herewith agreeth the common experience at this day. But if the husband maketh a gift in taile, reserving a rent to him and his heires, and after the donor taketh wife and dieth, the wife shall be endowed of this rent, because it is a rent in fee, and by possibilitie may continue for ever.

Of a common certaine a woman shall be endowed, but of a common *sauns number en grosse* she shall not be endowed, as hath beene said before. And so of a rent service, rent charge, and rent secke, she shall be endowed (6): but of an annuitie that chargeth onely the person, and issueth not out of any lands or tenements, she shall not be endowed. But if the freehold of the rents, common, &c. were suspended before the coverture, and so continue during the coverture, she shall not be endowed of them. If after the coverture the husband doth extinguish them by release or otherwise, yet she shall be endowed of them; for as to her dower they in the eye of the law have continuance.

If the wife be entitled to have dower of three acres of marsh, every one of the value of twelve pence, the heire by his industry and charge maketh it good meadow, every acre of the value of ten shillings, the wife shall have her dower according to the improved value, and not according to the value as it was in her husband's time: for her title is to the quantitie of the land, viz. one just third part (7).

And

[f] 4 E. 2.  
Tr. 333.  
26 E. 3. 58.  
46 E. 3.  
Dower 50.  
(Cro. Jam. 621.)  
[k] Bract. 98.  
308. Brit. 247.  
Flet. lib. 5. ca.  
23. 17 E. 2.  
Dower 104. 163.  
19 E. 3. Quar.  
Imp. 154.  
7 E. 3. 7.  
[l] Bract. 97.  
Brit. 146. 147.  
[m] Lib. Intr.  
Judgme. 18.  
fo. 330.  
11. Co. 95. 26.  
Harper's case.  
[n] 28. Ass. 3.  
8. H. 2. 2.  
Dower 184.  
1 E. 6. Dow. 89.

Vid. 1 E. 6.  
Dow. R. 89.  
(Ante 30. a.)

(Cro. Cha. 300.  
Ante 30. b.  
2. Ro. Abr. 675.  
Ante 29. b.)

7. Co. 33.  
Lillingston's case,  
6. Co. 78. Scig.  
Aburganie's case.  
(Post. 56. a. 171.  
a. 179. a. Peric.  
sect. 323. contra.)

(2) See post. 32. b. n. 2.

(3) [See Note 188.]

(4) [See Note 189.]

(5) [See Note 190.]

(6) [See Note 191.]

(7) [See Note 192.]

(F. N. B. 149.  
C.)  
V. 30 E. 1.  
Youch. 375.

And the like law it is if the heire improve the value of the land by building: and on the other side, if the value be impaired in the time of the heire, she shall be endowed according to the value at the time of the assignment, and not according to the value as it was in the time of her husband (8).

"*Ascens tempa durant le couverture.*" For the better understanding whereof it is to be knowne, that (as hath beene said) to dower three things doe belong, viz. marriage, seisin, and the death of the husband. Concerning the seisin, it is not necessarie that the same should continue during the couverture, for albeit the husband alieneth the lands or tenements, or extinguisheth the rents or commons, &c. yet the woman shall be endowed. But it is necessary that the marriage doe continue, for if that be dissolved the dower ceaseth, *ubi nullum matrimonium, ibi nulla dos*. But this is to be understood when the husband and wife are divorced *à vinculo matrimonii*, as in case of precontract, consanguinity, affinity, &c. and not *à mensa et thoro* only, as for adulterie (9). And yet it is said, that if the assignment of dower *ad ostium ecclesie* be specified, viz. that notwithstanding any divorce shall happen yet that she shall hold it for life, that this is good.

If the wife elope [o] from her husband, that is, if the wife leave her husband, and goeth away and tarrieth with her adulterer (10), she shall lose her dower until her husband willingly without coercion ecclesiasticall be reconciled unto her, and permit [32. b.] her to cohabit with him, all which is comprehended shortly in two hexameters, *Sponsæ virum mulier fugiens, et adultera facta, Dote sua careat, nisi sponsi sponse retracta*. And [h] if she goeth willingly with or to the avowtrer, this is a departure and a tarrying, albeit she remaineth not continually with the avowtrer, or if she tarrieth with him against her will, or if he turne her away, or if she cohabit with her husband, by the censures of the church, in all these cases she loseth her dowrie. But see notable matter hereof in the exposition upon the statute of *W. 2. cap. 34*.

"*En severaltie per metes et bounds.*" And yet in some cases where the husband was sole seised, the wife shall not be endowed in severaltie by metes and bounds (1). As for example, [7] if a man seised of lands in fee took a wife, and infeoffed eight persons, a writ of dower was brought against these eight persons, and two confesse the action, and the other six pleade in barre, and descend to issue, the demandant shall have judgment to recover the third part of two parts of the land, in eight parts to be divided, and after the issue being found for the demandant against the sixe, the demandant shall have judgement to recover against them the third part of sixe parts of the same lands, in eight parts to be divided, which is worthie the observation. But of this more shall be afterwards said in this Chapter.

But regularly *Littleton's* words are to be intended, where the husband was sole seised, for where he was seised in common, there she cannot be endowed by metes and bounds, as it appeareth in this Chapter,

(8) [See Note 193.]  
(9) [See Note 194.]

(10) [See Note 195.]  
(1) [See Note 195.]

Bract. 62.  
Brit. cap. 101.  
Brit. cap. 681.  
(1. Ro. Abr. 681.  
Doctr. Plac.  
148. Post. 33. b.  
4. Co. 39.  
4. Co. 9. b.

[o] W. 2. ca. 34.  
Lib. Intr. 224.  
Flota, lib. 3.  
c. 23. Bre. 109.  
Mirror, ca. 5.  
sect. 4.  
(F. N. B. 180.  
Perk. sect. 354.  
1. Ro. Abr. 680.  
1. Sid. 118.)  
[p] 3 E. 3. 2.  
6 E. 3. 39.  
9 E. 3. 30.  
19 E. 3.  
Dower 94.  
43 E. 3. 19.  
Vid. Fitz. N. B.  
150. b.  
8 E. 2.  
Dower 143.

[7] M. 2. & 2.  
Elix. Dier 187. b.  
16. Am. p. 2.  
17 E. 3. 4.  
Tr. 10 H. 5.  
Rot. 447.

Chapter, Sect. 44. *Nota*, the endowment by metes and bounds, according to the common right, is more beneficiall to the wife, than to be endowed against common right, for there she shall hold the land charged, in respect of a charge made after her title of dower (2).

“*Le quel el avoit issue per sa baron ou nemy.*” Herein the tenant in dower, as in many other cases, is preferred before the tenant by the curtesie; but yet this great disadvantage the wife hath, that she cannot enter into her dower by the common law, but is driven to her writ of dower to recover the same, wherein sometimes great delays are used, and therefore the well-advised friends of the wife will provide for a jointure to be made to her, as shall be said hereafter. For by the statute of [r] *Magna Charta*, cap. 7. she shall tarry in the chiefe house of her husband but by the space of fortie dayes after the death of her husband, within which time dower shall be assigned unto her, unlesse it were formerly assigned, &c. but of little effect was that act, for that no penaltie was thereby provided if it were not done: which terme of 40 dayes is in law called *Quarentina*. But if she marry within the 40 dayes, she loseth her quarentine (3). But some have said that by the ancient law of *England* the woman should continue a whole yeare in her husband's house, within which time if dower were not assigned, she might recover it: and this certainly was the law of *England* before the Conquest [s], *Muliercs viduas bis annos menses viduas exigunt, atque tum demum cui velint nubant, sin que ante annum nupsierit dote mulctata fortunis omnibus à priore marito relictus privatur*. But for the reliefe of the widow it was provided by the statute of *Merton* made Anno 20 H. 3. cap. 1. (which by [t] *Bracton* is called *Nova constitutio*) that the wife shall recover damages in her writ of dower from the time of the death of her husband (4). But herein divers things are observable. First, in what kind of writ of dower she shall recover her damages. In a writ for a dower *ad ostium ecclesie*, or *ex assensu patris*, she shall recover no damages, because she may enter, and the words of the statute be, *et dotes suas habere non possunt sine placito*. Also I have read in an ancient and learned reading upon this statute, that it extendeth only to a writ of dower, *Unde nihil habet*, and not to a writ of right of dower, for in no writ of right damages are to be recovered. 2. She shall recover damages only when her husband dies seised, (that is) seised of the freehold and inheritance [u], for albeit the husband before the title of dower had made a lease for yeares reserving a rent, the wife shall recover the third part of the reversion with a third part of the rent and damages, for the words of the statute be, *de quibus viri sui obierunt sciat* (5). 3. Some say that the demandant in a writ of dower, that delayeth herselfe, shall not recover damages, therefore let the demandant take heed thereof. 4. It is necessary for the wife after the decease of her husband as soon as she can to demand her dower before good testimony, for otherwise she may by her own default lose the value after the decease of her husband and her damages for detaining of her dower. For if she

26 E. 3. Dower  
133.  
10 E. 3. 31.  
17 E. 3. Dower  
164. 19 E. 3.  
Quar. Imp. 154.  
19 E. 4. 2.  
18 H. 6. 37.  
per Paston.

[r] *Magna Charta*, cap. 7.  
Fleta, lib. 6.  
cap. 23.  
Bracton, lib. 2.  
fo. 96.  
Britton, ca. 108.  
(Post. 34. b.)  
19 H. 6. 14.  
6 E. 3.  
Dyer 76.  
F. N. B. 161.  
Regist. Orig.  
174. 1 Marg.  
Dower 161.  
(2. Inst. 17.  
F. N. B. 161. A.)  
[s] Lamb. Sect.  
120. 71. & divers  
ancient manuscripts.  
See the 2. part of  
the Institutes, cap.  
7.  
[t] Bract. lib. 4.  
312. & lib. 2. 90.  
Britt. cap. 103.  
Fleta, lib. 6.  
cap. 23.

(Cao. Jam. 621.  
1. Leon. 56.)  
[u] Regist.  
Judic. 4.  
Origin. 173.  
Dyer 11. El. 284.  
Rast. pl. fo.  
225. &c.  
16 E. 3. tit.  
Damages 83.  
6 E. 2. ibid. 1.

(2) [See Note 197.]

(3) See further as to *Quarentine* 2. Inst.  
17. Barringt. Ant. Stat. 2d ed. p. 9, 10.  
Hugh. on Orig. Writs 193. and Vin. Abr.  
*Dower* l. 2.

(4) [See Note 1. 8.]

(5) *Damages in such case according to the  
value, not of the land but of the rent.* P. 22.  
Jac. C. B. Hal. MSS.

(Dr. and Stud.  
Dial. 2. c. 13.)

she bring a writ of dower against the heire, and the heire cometh into the court upon the summons the first day, and plead that he hath been always ready and yet is to render dower, &c. if the wife hath not requested her dower, she shall lose the mean values and her damages; but if she hath requested her dower, she may plead it, and issue may be thereupon taken.

[w] 5 E. 3. 1.  
41 E. 3.  
Dower 46. and  
not in the books  
at large.  
(Doctr. Plac.  
162.)  
[x] 16 E. 3.  
Dower 59.  
2 H. 4. 7.  
9 H. 4. 4. tit. issue  
133. 11 H. 4. 40. 13 E. 4. 7. 14 H. 8. 25. b.

But it is holden in some bookes [w] that a request *in pays* is not sufficient, and that it is the folly of the wife that she brought not her writ of dower sooner. But the law and many [x] bookes be against it, and the words of the plea (that he hath beene always ready, &c.) prove the same, and the words of the statute also prove this, *et dotes suas habere non possunt sine placito*.

(Doctr. Plac.  
162.)

And the reason why *tout temps priet*, is a good plea in a writ of dower brought against the heire to barre her of the meane [33. a.] values and damages is, because the heire holdeth by title, and doth no wrong till a demand be made (1). But in a writ of aiel, cosinage, &c. where the land and damages are to be recovered, there such a plea is not good; for there the tenant of the land hath no title, but holdeth the land by wrong, and the feoffee of the heire cannot at the first day plead *tout temps priet*, because he had not the land all the time, since the death of the ancestor. 5. It is to be observed, that the mean values and damages are to be recovered against the tenant in a writ of dower, as it appeareth in a notable record [y] betweene *Belfield* and *Rowse* (2). The tenant as to parcell pleaded non-tenure, and for the residue deteynement of charters, upon which pleas they were at issue, and both issues found by the jury against the tenant, and found further that the husband died seised such a day and yeare, and had issue a sonne, and that the demandant and the sonne by 6 yeares, together after the decease of the husband tooke the profits of the land, and after the sonne such a day and yeare died without issue, after whose decease the land descended to the tenant as uncle and heire to him, by force whereof he entred and took the profits untill the purchasing of the originall writ, and found the value of the land by the yeare, and assessed damages for the deteyning of the dower, and costs; and upon this verdict, after often debating, the demandant had judgment to recover her damages for all the time from the death of her husband without any defalcation (3). In which case many things apparent therein are observable. Let the tenant therefore take heed how he plead false pleas. 6. That this statute of *Merton* doth extend to copiholds [z] where the custome is, that women be dowable (4). 7. That if the wife hath dower assigned to her in chancery she shall have no damages [a], for the words of the statute be, *et vidua per placitum recuperaverint, &c.* So it is if the heire or his feoffee assigne dower, and the wife accepteth it, she loseth her damages.

A man seised of lands in fee taketh a wife and granteth a rent charge, and after maketh a feoffment in fee, and taketh backe an estate taile and dieth, the wife recovereth dower against the issue in taile

(1) [See Note 199.]  
(2) [Mich. 8. and 9. Eliz. Belford and Rows, Moor and Bendl. Hal. MSS. See Mo. 80. and N. Bendl. 153.]  
(3) [See Note 200.]

(4) Vid. Rot. Parl. 3 H. 6. n. 29. *special act of parliament for giving mesne values to the wife against the king, in casu comitissæ Marche.* Hal. MSS.

(S. C. Mo. 80.  
N. Bendl. 153.  
4. Leon. 198.)  
[y] Mich. 8. &  
9 Eliz. Rot.  
904. in Comm.  
Banc.  
9. Co. 15. b.  
Bednighfield's  
case. 1. Ro.  
Abr. 679.)

[z] Tr. 37.  
Eliz. 4. Co. 30. b.  
Shawe's case.  
[a] 43. Ass.  
Pl. 32  
(F. N. B. 263.)  
14 H. 8. 28.



taile by reddition, the wife maketh a surmise that her husband died seised, and prayeth a writ to enquire of the damages, and that is granted to her. In this case she holds the land charged with the rent charge, for by her prayer she accepteth herselfe dowable of the second estate (5), for of the first estate, whereof she was dowable, her husband died not seised, and so she hath concluded herselfe; wherefore if the rent charge be more to her detriment than the damages beneficiall to her, it is good for her in that case to make no such prayer (6).

"*De quel age que la femme soit, issint que el passe l'age de neuf ans (7) al temps del mort son baron.*" *Feme*, wife. Here *Littleton* speaketh of a wife generally, and generally it is to be understood as well of a wife *de facto*, as *de jure*. Therefore if the wife be past the age of 9 yeares [6] at the time of the death of her husband, she shall be endowed, of what age soever her husband be, albeit he were but 4 yeares old. *Quia junior non potest dotem promereri, neque virum sustinere; nec obstat mulieri petenti minor etas viri.* Wherein it is to be observed, that albeit *Consensus non concubitus facit matrimonium*, and that a woman cannot consent before 12 nor a man before 14, yet this inchoate and imperfect marriage (from the which either of the parties at the age of consent may disagree) after the death of the husband shall give dower to the wife, and therefore it is accounted in law after the death of the husband *legitimum matrimonium*, a lawfull marriage, *quoad dotem*. If a man taketh a wife of the age of 7 yeares, and after alien his land, and after the alienation the wife attaineth to the age of 9 yeares, and after the husband dieth, the wife shall be endowed: for albeit she was not absolutely dowable at the time of her marriage, yet she was conditionally dowable, viz. if she attained to the age of 9 yeares before the death of the husband, for so *Littleton* here saith, so that she passe the age of 9 yeares at the death of her husband, for by his death the possibility of dower is consummate.

And so it is if the husband alien his land, and then the wife is attainted of felony, now is she disabled, but if she be pardoned before the death of the husband, she shall be endowed. If the son indow his wife at the age of 7 yeares *ex assensu patris*, if she before the death of her husband attain to the age of 9 yeares the dower is good. But otherwise it is of an originall absolute disability; as if a man take an alien to wife, and after the husband alien the land, and after she is made denizen, the husband dieth, she shall not be indowed (8), because her capacity and possibility to be indowed came by the denization. Otherwise it is if she were naturalized by act of parliament, whereof see more in the Chapter of Villenage (9).

And the bishop upon an issue joyned in a writ of dower, *Quod nunquam fuerunt copulati legitimo matrimonio*, ought to certify that they were coupled in lawful marriage, albeit the man were under fourteene,

(1. Ro. Abr. 675. Docu. Plac. 148.)

[6] 3 E. 1. Dower 172. Itin. North. 8 E. 2. Dower 112. 7 E. 2. Dower 147. 19 E. 2. ib. 159. 21 E. 3. 28. 16 E. 3. Dower 67. 12 R. 2. Dower 54. 19 H. 4. 3. 33 H. 6. 40. 7 H. 6. 11, 12. 12 H. 4. Doctr. & Stud. Fitz. N. B. 149. b. 22 Eliz. Dower 369. Bract. fol. 92. Fleta, lib. 5. ca. 21. Lib. Intrat. fo. 123. (Post. 37. a. Ante 31. Cro. Jam. 539.)

(See 1. Salk. 120. S. C. 3. Leo. 410.)

(5) [See Note 201.]

(6) See further as to damages in dower. Hugh on Orig. Wr. 180. Treat. on Dow. in Gilb. Law of Uses 375. 2. L. Raym. 1384. New Abr. Dower I. Vin. Abr. Dower O. a. P. a. Say. Law of Dam. 16. and 17. Ch. 2. c. 8. sect. 3. and 4.

Case. B. R. temp. Hardw. 19. 50. 23.

(7) Vid. *Rast. Enter.* 228. novem annorum et dimid. *She ought to shew how much more she is than 9 yeares.*—Hal. MSS.

(8) [See Note 202.]

(9) Vid. *supra* fol. 31. b.—Hal. MSS. See Note 9. in 31. b.

(g. Co. 98. b.  
Berrie's case.)

[c] 10 E. 3. 35.  
Fleta, lib. 2.  
cap. 32. Brit.  
cap. 107.  
(7. Co. 41. b.)

[d] Bracton,  
lib. 4. fol. 304.  
Britton, ibidem.  
Fleta, lib. 2.  
cap. 32. 32 E. 1.  
Dier 160.  
(8. Co. 98. b.  
Ante 32. a.  
1. Ro. Abr.  
341. 681.  
Noy 108.)  
[e] Tr. 2. Ja.  
Rot. 1815. In  
Communi  
Banco, inter  
Stowell and Wilkes  
in Dower.

[f] 30 E. 3.  
12. b.

[g] W. 2. cap.  
34.  
(1. Mod. Rep.  
130. 2. Inst. 68.)

[h] Britton,  
cap. 106.  
Bracton, lib. 4.)  
fol. 301.  
[i] 31 E. 3. tit.  
Collusion 30.

[k] Bract. lib. 2.  
cap. 39. fol.  
92. &c.  
Fleta, lib. 5.  
cap. 32.  
Britton, cap.  
104.

fourteene, or the wife above nine, and under twelve (10). So it is if a marriage *de facto* be voidable by divorce (11), in respect of consanguinity, affinity, precontract, or such like, whereby the marriage might have bene dissolved, and the parties freed à *vinculo matrimonij*, yet if the husband die before any divorce, then for that it cannot now be avoyded, this wife *de facto* shall be endowed; [c] for this is *legitimum matrimonium* (as in the other case when the [33. b.] wife is *infra annos nubiles*) quoad dōtem. And so in a writ of dower the bishop ought to certifie, that they were *legitimo matrimonio copulati*, according to the words of the writ. And herewith agreeth 10 E. 3. 35. And [d] Bracton: *quamdiu duravit matrimonium, duravit dotis exactio, eo deficiente deficit dotis petitio, &c. poterit tamen replicare contra exceptionem illam, quod si aliquando fuit matrimonium propter consanguinitatem, &c. inter eos accusatum, nunquam tamen fuit in vita viri sui solutum nec divortium celebratum*. But if they were divorced à *vinculo matrimonij* in the life of her husband, she loseth her dower: otherwise it is if they were divorced [e] *causâ adulterij* (1), which is but à *mensâ et thoro*, and not à *vinculo matrimonij*, as it was adjudged. But some doe hold that a wife *de facto* shall not have an appeale of the death of her husband, but onely she that is a wife *de jure in favorem vite* (2). Vide 50. E. 3. fol. 15. 28 E. 3. 92. 27. Ass. *Stamf. Pl. Cor.* 59. and that there *unques accoupled in loyall matrimonie* shall be taken *de jure* strictly. And so in some cases a wife shall have dower where she cannot have an appeale, [f] and in other cases she shall have an appeale where she cannot have a writ of dower; as if she clope (3), &c. she is barred of her dower, but not of her appeale (4): and the reason is, for that the statute [g] barreth her of her dower, but not of her appeale. So if the husband be attainted of treason, &c. his wife shall not be endowed, and yet if any doe kill him, the wife shall have an appeale, the reason of the diversity shall appeare hereafter in this Chapter (5).

“Après le mort le baron.” [h] *Mortuo viro huic confirmatur dos*. This is intended of a naturall, not of a civil death. For if the husband entred in religion, [i] the wife shall not be endowed untill he be naturall dead (6).

And in this Chapter *Littleton* divideth dower into five parts; viz: dower by the common law. Secondly, dower by the custome. Thirdly, dower *ad ostium ecclesiæ*. Fourthly, dower *ex assensu patris*. And fifthly, dower *de la plus beale*. And all these dowers were instituted for a competent livelihood for the wife during her life: [k] *Propter onus matrimonij, et ad sustentationem uxoris et educationem liberorum, cum fuerint procreati, si vir præmoriatur*.

[10] [See Note 203.]

[11] [See Note 204.]

[33. b.]

(1) 10. E. 3. 15. Supra 32. Hal. MSS. See n. 9. in 32. a.

(2) Acc. 2. Hawk. Pl. C. b. 2. c. 23. s. 36. and the authorities there cited.

(3) To the books cited ante 32. a. n. 10. as to the effect of elopement on dower, add New Abr. tit. Marriage E. 1. Treat. on Dower in Gilb. Law of Uses 402.

(4) Acc. Bro. Appeal 17. Staund. Pl. C. 59. But see contra 2. Inst. 317. and 1. Mod. 130. by judge Hyde.

(5) See post. 37. a.

(6) [See Note 205.]

## Sect. 37.

**E**T nota, que per le common ley la feme n'avera pur sa dower forsque la tierce part des tenements que fueront a sa baron durant le espousels; mes per custome d'ascun pais el avera le moilie, et per le custome en ascun ville et burgh, el avera l'entiertie; et en tous tiels cases el serra dit tenant en dower.

**A**ND note, that by the common law the wife shall have for her dower but the third part of the tenements which were her husband's during the espousals; but by the custome of some county, she shall have the halfe, and by the custome in some towne or borough, she shall have the whole; and in all these cases she shall be called tenant in dower.

“**N**OTA, per le common ley la feme n'avera pur sa dower forsque [1] la tierce part, &c.” This third part is called *rationabilis dos*, or *dos legitima*, because it is the dower that the common law giveth. *Rationabilis autem dos est cujuslibet mulieris de quocunque tenemento tertiu pars omnium terrarum et tenementorum que vir suus tenuit de dominio suo ut de feodo, &c.*

“*Mes per custome d'ascun pais (7) el avera le moitie, et per le custome en ascun ville et burgh el avera l'entiertie.*” Such a [m] custome may extend to a county, city, or an ancient burgh without question; and with this custome, as here it appeareth by *Littleton*, may extend to upland townes, which are neither counties, cities, nor boroughs. But the surer pleading, in this and the like cases, is to lay the custome within a manor or seigniority, if the truth of the case will so beare it (8). By the custome of Gavelkind [n] the wife shall be indowed of the moiety, so long as she keepe herselfe sole, and without child, which she cannot waive and take her thirds for her life (9). For in that case, *Consuetudo tollit communem legem* (10).

And as custome may enlarge, (11) so may custome abridge dower, and restraints it to a fourth part, &c.

[1] *Glau. lib. 6. cap. 1.*  
*Bracton, ubi supra.*  
*Britton, ubi supra.*  
*Plata, ubi supra.*  
*Mikror. cap. 1. sect. 3.*  
*Magna Carta, cap. 7.*

*Fig. N. B.*  
*150. O.*  
[m] 31 E. 4.  
53, 54.  
7 H. 6. 26.  
22 H. 6. 14.  
21 H. 7. 17.  
40. Ass. 27. 41.  
26 E. 2. Prescriptio 33.  
43 E. 3. 38. 46.  
Ass. 6. Dier 363.  
39 E. 3. 2. 10.  
14 E. 3.  
Barre 377.  
13 E. 3. tit. Dower 66.  
(1 Ro. Abr. 508. 263.)  
[n] Vide le statute de consuetud.  
Kancie, &c.  
Trin. 17 E. 3. eorum rege Kan. in

Thesaur. in which record Sententia significeth Widowhood.

[34. a.]

## Sect. 38.

**A**UXF, sont deux autres manieres de dower, c'est ascavoir, dower que est appelle dowerment ad ostium ecclesie, et dower appelle dowerment ex assensu patris.

**A**LSO, there be two other kinds of dower, viz. dower which is called dowerment at the church doore, and dower called dowerment by the father's assent.

This shall be explained by that which shall be said in the two Sections next ensuing.

(7) [See Note 206.]

(8) Nota, the writ special. Hal. MSS.

(9) See acc. Robins. Gavelk. 159.

(10) [See Note 307.]

(11) [See Note 208.]

## Sect. 39.

**D**OWMENT *ad ostium ecclesiæ* est, lou home de plein age seisie en fee simple que serra espouse a un feme, quant il rient al huis del monastery ou d'esglise d'estre espouse, et la, apres affiance enter eux fait, il endowe la feme de sa entier terre ou de la moity, ou d'autre mendre parcel, et la overtment declare le quantitie et la certainty de la terre que el atera pür sa dower. En ceo case la feme, apres le mort le baron, poit entrer en le dit quantitie de terre dont le baron luy endowe, sans auler assignement de nulluy.

**D**OWMENT at the church doore is, where a man of full age seised in fee simple who shall be married to a woman, and when he commeth to the church doore to be married, there, after affiance and troth plighted betweene them, he endoweth the woman of his whole land or of the halfe, or other lesser part thereof, and there openly doth declare the quantity and the certainty of the land which she shall have for her dower. In this case the wife, after the death of the husband, may enter into the said quantity of land of which her husband endowed her, without other assignment of any.

10 H. 3. Dower 300.

**I**F this dower be made *ad ostium castri sive mesuagii* it is not good, but ought to be made *ad ostium ecclesiæ sive monasterii*.

*Et sciendum est, [o] quòd hæc constitutio fieri debet in facie ecclesiæ, et ad ostium ecclesiæ; non enim valet facta in lecto mortali\*, vel in camerâ, vel alibi ubi clandestina fuere conjugia.* For the law requires, that this and like matters be done publicly and solemnly.

[o] Bracton, lib. 2. cap. 36.  
Mirror, cap. 1.  
sect. 3. and cap. 5.  
10 H. 3.  
Dower 301.

F. N. B. 150. m. B. Fleta, lib. 1. cap. 22, &c. Britton, cap. 101. 108, &c. (Perk. sect. 306.)

“*Ou home de pleine age.*” That is of one and twenty yeares.

Anno 9 H. 3. Dower 197. A man of the age of eighteen yeares tooke a wife, and by assent of his guardian endowed her *ad ostium ecclesiæ*, and it was adjudged a good endowment, albeit the husband dyed before the age of one and twentie yeares; but I hold *Littleton's* opinion to be good law.

“*La, apres affiance enter eux.*” (1) *Affidare est fidem dare*, affiance or sponsalitie, and is derived of this word *spondeo*, because they contract themselves together; *et ideo sponsalia dicuntur [h] futurarum nuptiarum conventio, et repromissio* (2). But this dower is ever after marriage solemnized (3), and therefore this dower is good without deed, because he cannot make a deed to his wife. For no assignment of dower *ad ostium ecclesiæ* can be made before marriage, for that before marriage the woman is not intituled to have dower.

“*Dr*”

9 H. 3. Dower 197.  
(Post. 38. a.  
l. Ro. Abr. 682.)

[p] Glanvil.  
lib. 6. ca. 1.  
40 E. 3. 43.  
Vide Vernon's  
case, 4. Co. 1, 2.

\* Quære, if this should not be read  
*lecto maritali.*

(1) [See Note 209.]

(2) [See Note 210.]

(3) [See Note 211.]

"*De sa entier terre ou de la moitie.*" (4) In ancient time [q] as [34. b.] it appeareth by Glanvill, lib. 6. cap. 1. it was taken that a man could not have endowed his wife *ad ostium ecclesie* of more than a third part, but of lesse he might. But at this day [r] the law is taken as *Littleton* here holdeth. An assignement of dower, [s] where the husband was sole seised, cannot be made of the third or fourth part in common, but ought to be in severaltie (1).

[q] F. N. B. 190. [r] 20 E. 3. Sacre 132. 45 E. 3. 6. Fleta, lib. 5. 23.

[q] Glanvill, lib. 6. cap. 1. Br act. lib. 2. cap. 38, 39. and lib. 4. tract. 6. cap. 1. & 6. Britton, cap. 101, &c. Fleta, lib. 5. cap. 23, &c. (1. Ro. Abr. 682.7)

"*Et la overtment [t] declare le quantitie et certecintie del terre.*" Here be two things that the law doth delight in, viz. first to have this and the like openly and solemnly done. Secondly, to have certaintie, which is the mother of quiet and repose. And this word (moitie) abovesaid is to be entended of the halfe in certaintie, and not of the moitie in common, which cleerly [u] appeareth in that here *Littleton* saith, the quantitie and certaintie of the land.

[t] Britton, cap. 101. Bracton, lib. 2. cap. 18.

[u] Vide 14 H. 3. Dower 189. 9 H. 3. Dower 190. 8 H. 3. Dower 195. F. N. B. 150. 40 E. 3. 23.

"*En ceo case la feme poet entrer en le dit quantitie del terre.*" And afterwards *Sectione 43* he saith, *Nota, que en tous cases lou le certaintie appeirt, queux terres ou tenements feme avera pur sa dower, la feme poet entrer apres le mort son baron.* It was instituted in favour and reliefe of wives, that a man after marriage might assigne to his wife certaintie of dower, to the end that the widow should not be driven to a long and chargeable suit wherein delay might be used, and in the mean time her life spent, together with her money also. For albeit the [w] law hath provided *quodd vidua post mortem mariti sui non det aliquid pro dote sua, et maneat in capitali mesuagio mariti sui per quadraginta dies post obitum mariti sui, infra quos dies assignetur ei dos sua, nisi prius ei assignata fuerit, &c. et habeat rationabile estoverium suum interim in communi*, yet because there was no penaltie or punishment inflicted, the tenant of the land may drive her to sue for her dower. And this continuance of the widow in the capitall mesuage, is in law called a quarentine, *quarentina*, for that it is by the space of fortie days, as is aforesaid (2). And if the heire or other tenant of the land put her out, she may have her writ *De quarentinâ habendâ*. If the wife marry within the fortie dayes she loseth her quarentine, for her habitation in the house is personall to her, and only given to her in judgment of law during her widowhood, albeit the words of the law be generall. And therefore to the end that widowes might have certaintie of estate, and that they might enter (3) and not be driven to suit, the law hath provided dower *ad ostium ecclesie*, and, as it shall appeare hereafter, dower *ex assensu patris*. And lastly, by making of a joyniture, of which, (being no dower but made in satisfaction of dower either before or after marriage) it is necessary that something should be said hereafter in his apt place, for that this now falleth out to be the surest way.

[w] Magna Carta, cap. 7. See the Second Part of the Institutes, cap. 7. Fleta, lib. 5. cap. 23. Britton, cap. 103. Bract. lib. 2. cap. 40. Regist. 175. Vide Dyer 6 E. 6. 76. b. and 161. a. F. N. B. 161. 1. Marie. Br. 161. (Ante 32. 80)

Nota, surest way.

"*En tous cases quant le certecintie appeirt, &c. la feme poet entrer apres le mort del baron.*" This is to be intended where the certaintie appeareth upon an assignement of dower *ad ostium ecclesie*, or *ex assensu patris*. For if a woman bring a writ of dower of sixe pound rent

(1. Ro. Abr. 681. 2. Inst. 678. 32 H. 8. cap. 5. of execution.)

(4) [See Note 212.]

[34. b.]

(1) [See Note 213.]

(1) See further as to *quarentine* ante 32. b. and n. 3. there. and Treat. on Dow. in Gilb. Law of Uses, 372.

(3) [See Note 214.]

[x] 45 E. 3. 26.  
48 E. 3. 30.  
22. Ass. 87.  
39 E. 3. 12.  
37 H. 6. 38.  
39 H. 6. 26.  
1 H. 5. 2.  
Brev. 100.  
38 E. 3. 30.  
21 E. 4. 3.  
Vide 1. Co.  
Shilley's case.  
40 E. 3. 23.

rent charge, and she hath judgement to recover the third part, albeit it be certain that she shall have fortie shillings, yet she cannot [x] distreine for 40 shillings, before the sherife doe deliver the same unto her: (4) for wheresoever the writ demands land, rent, or other things in certain, the demandant after judgement may enter or distrein before any seisin delivered to him by the sherife upon a writ of *habere facias seisinam*. But in dower where the writ demandeth nothing in certaine, there the demandant after the judgement cannot enter or distreine untill execution sued, by which execution the sherife is by the king's writ to deliver the third part in certaintie to the demandant. And so it is when the wife of one tenant in common demands a third part of a moitie, yet after judgement she cannot enter untill the sherife deliver to her the third part, albeit the deliverie of the sherife shall reduce it to no more certaintie then it was (5).

"*Sauno auter assignement (6) de nulluy.*" For as concerning dower at the common law, there must be assignement either by the sherife, (as hath been said) by the king's writ, or else by the heire or other tenant of the land by consent and agreement between them. To a perfect assignement of dower eight things are to be observed: [a] First, regularly the assignement must be certaine, as our author here saith (7).

[y] 8 E. 2.  
Ent. 75.  
40 E. 3. 22.  
45 E. 3. 5, 6.  
[b] 1. Mar.  
Dyer 91.  
1 E. 2.  
Dower 146.  
28 H. 6. 2.  
Dyer 9. El. 263.  
20 Ass. 41.  
31 E. 3. Scir. R.  
90.  
33 H. 6. 2.  
Vernon's case.

Secondly, (8) it [b] must be either of some part of the land whereof she is dowable, or of a rent or some other profit issuing out of the same, either before judgement or after, which rent may be assigned to her by parol. But an assignement of other land whereof she is not dowable, or of a rent issuing out of the same, is no barre of her dower (9).

Thirdly, the assignement must be absolute, and not conditionall, or subject to any limitation (10).

Fourthly, it must be made by him that is tenant of the land; but herein certaine diversities are to be observed (11).

[c] 7 H. 6. 24.  
10 E. 4.  
Dower 160.  
10 E. 3. 38.  
[d] Co. 67.)

If two or more be jointenants of lands, [c] the one of them may assigne dower to the wife of a third part in certaintie, and [35. a.] this shall binde his companions, because they were compellable to do the same by law (1). But if one of them assigne a rent out of the land to the wife, this shall not binde his companion, because he was not compellable by the law thereunto (2). If the husband make several feoffments of severall parcells, and dyeth, and the one feoffee assigne dower to the wife of parcell of land in satisfaction of all the dower which she ought to have in the land of the other feoffees, the other feoffees shall take no benefit of this assignement, because they are strangers thereunto, and cannot plead the same (3). But in that case

[e] Co. 18.  
Mo. 30.)

(4) 20 E. 4. 14. Hal. MSS.

(4) [See Note 215.]

(5) Nota, *P. 38 Eliz. Wentworth's case. It ought to be pleaded by the word assignavit not dedit.* Hal. MSS.—See Cro. Eliz. 452.

(6) Vid. ante 32. b. *Lambert's case.* Hal. MSS.—See n. 1. in 32. b. & *supra* n. 1.

(8) 12 H. 4. 17. Hal. MSS.

(9) [See Note 216.]

(10) [See Note 217.]

(11) *And this ought to be averred in plead.* Dy. 261. Hal. MSS.—See S. C. in Cro. Eliz.

451. and Noy 55.

[35. a.]

(1) [See Note 218.]

(2) [See Note 219.]

(3) Vid. the statute of Westminster 1. cap. 48. 4 E. 3. 42. *M. 8. Jack. C. B. n. 15. D. D. adjudged accordingly in Throgmorton's case.* Hal. MSS.—However, Mr. Perkins seems to think, that such an assignment by one feoffee may be pleaded in bar of dower by the other feoffees. Perk. sect. 402.

case if the husband dyeth seised of other lands in fee simple, and the same descend to his heire, and the heire endoweth the wife of certaine of those lands in full satisfaction of all the dower that she ought to have as well in the lands of the feoffees as in his owne lands, this assignement is good, and the several feoffees shall take advantage of it (4). And therefore if the wife bring a writ of dower against any of them, they may vouch the heire, and he may pleade the assignement which he himselfe hath made in safety of himselfe, lest they should recover in value against him, [d] so as there is a privity in this respect betwene the heire and the feoffees, and by this meanes the same may be pleaded by the heire that made it (5). And so it is adjudged in our booke, which is a notable case for many purposes.

Fifthly, if assignement be made [c] by any disseisor, abator, intrudor, or any wrong doer, of lands or tenements, if they came to that estate by collusion and covin betwene the widow and them, albeit the widow hath just cause of action, and the assignement be indifferently made after judgement by the sherife of an equall third part, yet shall the disseisee, &c. avoyd it, for covin in this case shall suffocate the right that appertained to her; and so the wrongfull manner shall avoyd the matter that is lawfull (6).

Sixthly, An assignement by [f] (7) a disseisor, abator, intrudor, &c. if there be no covin, is good, unlesse it be prejudiciall to the disseisee, &c. As if the husband [g] infeoffeth the younger sonne with warranty, the eldest sonne disseise the yongest sonne, and endow the widow, in this case the yonger sonne shall avoyd this assignement (8), for otherwise he shall lose his warrantie: but a disseisor, abator, intrudor, &c. cannot assigne a rent out of the land to her for her dower, to bind the disseisee, &c.

Seventhly, No assignement can be made, but by such as have a freehold (9) (as hath beene said), or against whom a writ of dower doth lie, and therefore [h] an assignement by a gardian in socage is voyd (10); but a gardian in chivalry may assigne dower (11), as shall be said hereafter, because a writ of dower lieth against him, and not against a gardian in socage.

Eighthly, And before the gardian in chivalry enter (12), the heir within age [i] may assigne dower, for the gardian may waive the wardship. And so briefly have you heard, of what, by whom, and to whom the assignement must be made (13). But there needeth neither livery of seisin, nor writing, to any assignement of dower, because it is due of common right.

(4) 31. E. 3. *Scire facias* 99. Hal. MSS.

(5) Vid. if the heir by receipt shall have the plea. *Kilb.* 128. Hal. MSS.

(6) See further on this subject Hugh. on Orig. Wr. 199.

(7) 3 E. 3. 1. 50. E. 3. 7, 8. Hal. MSS.

(8) 3 E. 3. 18. By Herle, the assignement shall bar in such a case. Hal. MSS.

(9) Acc. Perk. 404.

(10) A quere is made of this in 1 F. 1 Abr. 682.

(11) And yet guardian in chivalry had only a chattel interest. See post. 38. b. where it is explained why a dower might be brought against him.

(12) But not after entry of the guardian, 9. H. 6. 6. Hal. MSS.

(13) See further as to assignment of dower, post. 39. b. Perk. sect. 393. to 423. Hugh. on Orig. Wr. 194. and 198. New Abr. Dower D. and Vin. Abr. Dower 8. to A. a.

[d] 33 E. 3. tit. Judgm. 254.

4 E. 3. 69.

17 E. 3. 68. b.

3 E. 3. tit.

Dower 70.

3 E. 3.

Vouch. 196.

See the Second Part of the Insti.

tit. W. 1.

cap. 49.

[c] 25. Am. p. 1.

44. Am. 39.

44. E. 3. 46.

37. Ass. 74.

11 H. 4. 60.

18 E. 4. 4.

19 H. 6. 12.

Litt. 83. 151.

(2. Co. 67.

1. Ro. Abr. 549.

1. Sld. 21.

Post. 387.

3. Co. 78.

6. Co. 58. a.

5. Co. 30. b.)

[f] 12. Am.

p. 20.

31 E. 3. 12.

[g] 3 E. 3. tit.

Dower 77.

16 E. 3. tit.

dower Statum.

(Post. 357.)

[h] 31 E. 1.

Dower 181.

29 Am. 68. j

18 E. 3.

Dower 69.

(6. Co. 57.)

[i] 7. R. 2. adme-

surement 4.

F. N. B. 148. f.

(Post. 38. b.)

## Sect. 40.

**D**OWMENT *ex assensu patris*, *Est, lou le pier est seisié de tenements en fee, et son fils et heire apparent, quant il est espoûs, endowe sa feme al huys del monasterie ou del esglise, de parcel de terres ou tenements son pier de assent son pier, et assigne la quantitie et les parcells. En ceo case apres le mort le fils, la feme entera en mesme le parcell sauns auter assignement de nulluy. Mes il ad este dit en cest case, que il corvient a la feme d'aver un fait de le pier proutant son assent et consent de cel endowment.* *M. 44 E. 3. fol. 45.*  
(1).

**D**OWMENT by assent of the father is, where the father is seised of tenements in fee, and his sonne and heire apparent, when he is married, endoweth his wife at the monastery or church doore, of parcel of his father's lands or tenements with the assent of his father, and assigns the quantity and parcells. In this case after the death of the son, the wife shall enter into the same parcell without the assignment of any. But it hath been sayd in this case, that it behooveth the wife to have a deed of the father to proove his assent and consent to this endowment. *M. 44 E. 3. f. 45.*

Brit. ca. 109.  
Fleta, lib. 5.  
ca. 22, 23.  
Bract. lib. 5.  
302.  
6 E. 3. 34.  
F. N. B. 180.  
(1. Ro. Abr. 677.)

(1. Sid. 3.  
Past. 36. b.)

“**L**OU le pier est seisié de tenements en fee.” Tenant for life of a carve of land, the reversion to the father in fee, the sonne and heire apparent of the father endoweth his wife of this carve, by the assent of the father, the tenant for life dieth, the husband dieth, the reversion was a tenement in the father, and yet this is no good endowment *ex assensu patris*, because the father at the time of the assent had but a reversion expectant upon a freehold, whercof he could not have endowed his owne wife (14); and albeit the tenant for life died, living the husband, yet, *quod initio non valet, tractu temporis non convalescet*. And for the most part, [35. b.] dower *ad ostium ecclesie*, and *ex assensu patris*, ensue the nature of a dower at the common law. And for these the wife may have a writ of dower, albeit they be certaine, as for the third part at the common law (2).

“*Et son fils et heire apparent.*” It must be such a sonne and heire apparent, as must continue an heire apparent, and therefore the yongest sonne and heire apparent cannot endow his wife *ex assensu patris*, of lands whereof the father is seised in fee of the nature of Borough English, because the father may have another sonne, and then the husband is not heire apparent: and it is in respect of the constant and perpetuall apparance, that the sonne and heire apparent may endow his wife of his father's lands. And so it is of lands in Gavelkind: [k] and this is the reason that dower *ex assensu fratris*, or *consanguinei*, is not good, for that albeit he is heire apparent at that time, yet for the common possibility that he may have issue, and every issue that the brother or cosin should have afterwards shall

exclude

(14) S. p. acc. Perk. 445.

L. and M. Roh. or P. It was first inserted in Redman's edition. See the observation on this addition to Littleton, post. 36. a.

(2) See acc. ante 34. b. n. 2.

[35. b.]

(1) No reference to the Year Book, in

(A) 8 H. 3.  
Dower 193.  
9 H. 3.  
Dower 191.  
11 H. 3.  
Dower. F. N. B.  
180. l.  
29 E. 3.  
Dow. 134.



exclude him, he is no such heire apparent as the law intendeth.

[l] But an endowment *ex assensu matris*, is as good as *ex assensu patris*, because there is an apparence of a constant and perpetuall heire. And some have said, that if the father after his assent be attainted of treason or felony, that the wife in that case loseth her dower, because her husband doth not continue heire (3).

[l] F. N. B.  
180. c. Flet. 1. 5.  
cap. 23 Bract.  
lib. 4. 305.  
Ambr. Gorge's  
case. 6. Co. 22.

"*Quant il est espousee, endow sa feme.*" [m] In this case, albeit the freehold and inheritance is in the father, yet in respect (as hath been said) of the constant and perpetuall apparence of the heire, the heire apparent doth endow, and the father doth but assent. And therefore where the father did endow the wife of his sonne and heire apparent, that endowment was holden void, because the husband in that case must endow, and the father assent.

[m] 2. H. 3.  
Dower 199.  
(Post. 38. a.)  
6 E. 3. 34.  
8 E. 2.  
Dower 154.  
2 H. 3.  
Dower 199.

And it is holden in 2 H. 3. Dower 199. (4), That if the heire apparent be within age, yet the endowment *ex assensu patris* is good. Note, *Littleton* in the case of dower *ad ostium ecclesie*, doth put the husband of full age, but here of the dower *ex assensu patris*, he speaketh generally.

"*Et assigne le quantitie et les parcels.*" So as both in dower *ad ostium ecclesie*, et *ex assensu patris*, the certainty must be expressed. And therefore where books speake of a moiety, it is intended (as hath been said) of an halfe in certaine (5).

[n] 9. H. 3.  
Dower 190.  
F. N. B. 150. m.  
8 E. 2.  
Dower 154.

"*Après la mort le fitz sa feme entera.*" In this case after the death of the husband the wife shall enter, or have a writ of dower albeit the father be alive.

"*Que il covient al feme d'aver un fait provant son assent a cel endowment.*"

"*Un fait,*" A deed, *factum*. This word (deed) in the understanding of the common law is an instrument written in parchment or paper, [o] whereunto ten things are necessarily incident: viz. First, writing. Secondly, in parchment or paper. Thirdly, a person able to contract. Fourthly, by a sufficient name. Fifthly, a person able to be contracted with. Sixthly, by a sufficient name. Seventhly, a thing to be contracted for. Eightly, apt words required by law. Ninthly, sealing. And tently, delivery. A deed cannot be written upon wood, leather, cloath, or the like, but onely upon parchment or paper, for the writing upon them can be least vitiated, altered, or corrupted.

[o] Bract. lib. 2.  
fol. 33. &c. &  
1. s. fol. 395.  
Brit. fol. 34. 65,  
66. 101.  
Flet. 1. 3. ca. 14.  
& lib. 6. ca. 32.  
& lib. 3. c. 3, 4,  
5, 6.  
(2. Co. 5.  
Post. 229. a.)  
2. Ro. Abr. 21.)  
(5. Co. 74. 76.)  
[p] 4 E. 2.  
Fines 116. 24  
E. 2. Ley 79.  
4 E. 2. Ley 78.  
27 H. 6. 10.  
27 H. 8. 32.  
F. N. B. 172. l.  
(5. Co. 18.)

If a deed [p] be alledged in *count* or *plea*, regularly it must be shewed to the court (6), to the end the court may judge whether there be apt words to make it a good contract according to the rule of law, whereof more shall be said in the Chapter of Conditions. But if *non est factum* be pleaded (7), because thereby the sealing, delivery, or other matter of fact is denied, it shall be tried by the country.

(3) See *Plowd. Quær.* 181.

(4) *This book is not to the purpose.* Hal. MSS.

(5) *Dower good of a moiety in common in the said book.* Vid. ante. Hal. MSS.—

See acc. 9. H. 3. Dower 190. which is the book meant by lord Hale. See also ante. b. n. 1.

(6) [See Note 229.]

(7) [See Note 221.]

country. Of deeds some be indented, and some be deeds poll. Of indented, some be bipartite, some tripartite, some quadripartite, &c. whereof more shall be said in the Chapter of Conditions. Also of deeds, some be inrolled, and some [g] be not inrolled. If it be inrolled according to the statute of 27 Hen. 8. cap. 10. it must be inrolled in parchment for the strength and continuance thereof, and not in paper, and so it was it resolved in parliament by the judges in anno 23 Eliz. Now for the rest of the parts of a deed, you shall read thereof plentifully in our bookes, and in my Reports; which by this short instruction you shall easily understand (1).

“*Un fait de feoffement.*” It is properly called *charta feoffamenti* (2), and yet if such a deed be denied, the plea is *non est factum*. So as of deeds some concerne the realtie, as here a deed of feoffment; some the personaltie, as a deed of gift of goods, obligations, bills, &c. And some mixt, whereof more shall be said in the Chapter of Releases.

If a man deliver a writing sealed, to the partie to whom it is made, as an escrow to be his deed upon certaine conditions, &c. this is an absolute deliverie of the deed, being made to the partie himself, for the deliverie is sufficient without speaking of any words (otherwise a man that is mute could not deliver a deed), and tradition is onely requisite, and then when the words are contrarie to the act which is the deliverie, the words are of none effect, *non quod dictum est, sed quod factum est inspicitur*. And hereof though there hath been [r] variety of opinions, yet is the law now settled agreeable to judgments in former times, and so was it resolved by the whole court of common pleas (3). But it may be delivered to a stranger, as an escrow, &c. because the bare act of deliverie to him without words worketh nothing (4). And this is the ancient diversitie [s] in our bookes, the record whereof I have seene agreeable with the reason of our old bookes (5). And as a deed may be delivered to the partie without words so may a deed be delivered by words without any act of deliverie (6), as if the writing sealed lyeth upon the table, and the feoffor or obligor saith to the feoffee or obligee, Goe and take up the said writing, it is sufficient for you, or it will serve the turne; or, Take it as my deed, or the like words, it is a sufficient delivery (7).

Of deeds and their distinctions you shall reade excellent matter in antiquitie. [t] *Cartarum, alia regia, alia privatarum, et regiarum, alia privata, alia communis, et alia universitatis. Privatarum, alia de puro feoffamento et simplici, alia de feoffamento conditionali sive conventionali, alia de recognitione pura, vel conditionali, alia de quiete clamantia, alia de confirmatione, &c. Verba intentioni, non è contra, debent inservire.*

Carta

(1) See further as to deeds, Perk. c. 2. ante 6. a. and n. 5. there. Sheph. Touchst. c. 4. Vin. Abr. tit. *Deeds* and also tit. *Faits*. Com. Dig. *Fait*.

(2) For the formal parts of a deed of feoffment, see ante 6. a.

(3) In Mo. 697. there is an opinion of some judges in 39 Eliz. to the contrary; but the authorities since are with lord Coke. See acc. Mo. 642. Noy 6. Hob. 246.

9. Co. 137. Sty. 251. 6. Mod. 218.

(4) See Dy. 167. b.

(5) [See Note 222.]

(6) [See Note 223.]

(7) Trin. 3. Eliz. Gibson vers. Tenant Bendl. n. 140. Hal. MSS.—See S. C. in N. Bendl. 92. and Dy. 192.—See further as to the delivery of deeds Sheph. Touchst. 57. Com. Dig. *Fait* A. 3. Vin. Abr. *Faits*. I and K.

[g] Brit. fol. 161.  
[r] Bract. l. 2.  
[s] fol. 33.  
[t] Fleta, lib. 3. ca. 14.  
( 2. Inst. 673.)

(2. RoL. Abr. 26.  
9. Co. 137.  
Noy 50. 11.  
Cro. Jam. 86.)  
35. Ass. Pl. 11.  
Tr. 39 H. 8.  
Dyer 98.  
(1. Cro. El. 133.  
Hob. 246.  
Dy. 34. b.  
N. Ben. 76.  
1. And. 4. Cro.  
El. 844.  
1. Raym. 197.  
Ow. 95.  
Dy. 102. b.  
Dul. 104.)  
[r] Tr. 43.  
Eliz. inter Hau-  
kesby & Lacher in  
the King's Bench.  
Hill. 12. Ja. R. in  
the Common place.  
(5. Co. 119. b.)  
[s] 13 H. 8.  
19 H. 8. s.  
4 E. 3. 18.  
15 H. 4. s.  
(3. Co. 25. b.  
1. Leon. 140.  
2. Ro. Abr. 24.)

[t] Bract. lib. 2.  
fol. 33. b.  
Fleta, lib. 3.  
cap. 14.

*Carta non est [u] nisi vestimentum donationis. Carta non est nisi vestimentum orationis. Nemo tenetur armare adversarium suum contra se. Scriptum est instrumentum ad instruendum quod mens vult. Carta est legatus mentis. [w] Benigna sunt faciende interpretationes cartarum propter simplicitatem laicorum, ut res magis valeat quam pereat. Nihil tam [x] conveniens est naturali equitati, quam voluntatem domini volentis rem suam in alium transferre ratam habere.*

[u] Fletch. lib. 6. ca. 28.  
[w] Bracton, lib. 2. fo. 34.

[w] Bracton, lib. 2. fo. 94. 95.

[x] Magn. l. 2. fo. 18.

[y] *Re, verbis, scripto, consensu traditione, junctura vestes aumere facta solent.*

[y] Pl. Com. in Throgmorton's case, fol. 161. b.

*Verba cartarum fortius accipiuntur contra proferentem. Generale dictum generaliter est intelligendum. Verba debent intelligi secundum subjectam materiam. Carta de non ente non valet.*

Note, the father may [a] make a deed to the wife of his sonne, and so is the law holden, for that the father's land by his assent is charged with a future freehold whereunto a deed is requisite; but to a dower *ad ostium ecclesie* no deed is requisite. And here it is not well done (of him that made the addition to our author) to vouch 44 E. 3. fol. 45: because the author himselfe vouched it not, for if he [b] meant to have vouched authorities, he would have vouched more than one in this case, and those that [c] he vouched he would have cited truly, but this case is mistaken both in the yeare and in the lease, for whereas it is cited in 44 E. 3. it is in 40 E. 3. and whereas he saith it is fo. 45, it is fo. 43.

[a] 3 E. 2. Dower 126.  
8 E. 2. Dower 184.  
6 E. 3. 34.  
40 E. 3. 43.

[b] 11 H. 3. Dower 186.  
14 H. 3. Dower.  
[c] 3 E. 2. Dower 126.  
Vid. Stat. Wallim anno 13 E. 1. fol. 18. in veteri magna carta. 47 E. 3. Dower 174.  
[d] F. N. B. 180. p. Glanvil. lib. 6. ca. 1. 2. 3.

An assignment of dower [d] either *ad ostium ecclesie*, or *ex assensu patris*, may be made of more than a third part. But the ancient law was that no greater assignment could be made in those cases but of a third part, but lesse might, as appeareth in *Glanvill*.

## Sect. 41.

**E**T si apres la mort le baron el senter, et agree a ascun tiel dower de les dits dowers *ad ostium ecclesie*, &c. donque el est conclude de clamer ascun auter dower per le common ley d'ascuns terres ou tenements queux fuerant, a sa dit baron. Mes si el voit, el poit refuser tiel dower *ad ostium ecclesie*, &c. et donque el poest estre endow solongue le cours del common ley.

**A**ND if after the death of her husband she entreth, and agree to any such dower of the said dowers at the church doore, &c. then she is concluded to claime any other dower by the common law of any of the lands or tenements which were her husband's. But if she will, she may refuse such dower at the church dore, &c. and then she may be endowed after the course of the common law.

“**E**L est conclude a clamer ascun auter dower per la common ley.”

[36. b.] (8) Wherein a diversitie is to be observed betweene a dower *ad ostium ecclesie*, or *ex assensu patris*, and a joynture or estate made to the wife in satisfaction of her dower, for one of those dowers being assented unto is a barre of the dower at the common law, but a joynture was no barre of her dower at the common law. For a right or title that one hath to a freehold cannot be barred by acceptance of collateral satisfaction (1). But a woman cannot

(Doe. Pla. 149.)  
Vernon's case, 4 Co. 1.  
1. Marie, Dyer 91. 31 E. 3.  
Seire fine 90.  
20 E. 4. 3.

(8) Vid. 32 E. 1. Dower 126. 177.—  
Hal. MSS.

(1) [See Note 224.]

(Dy. 248. a.  
327. a.)  
47 H. 8. cap. 10.

(a) 12 E. 2.  
Dower 158.  
37 H. 8. cap. 10.  
verus finem.  
(4. Co. 1.  
3. Cro. Jam.  
489.)

(1. Sid. 2.)

Leake & Randall's  
case.  
4. Co. 4.  
(3. Co. 26. 37.)

Vide Vernon's  
case, ubi supra,  
fo. 2. b.

Dyer 10 E. 10. 388.

not have a double dower, viz. *ad ostium ecclesie*, &c. and at the common law, for the wife of one husband can but have one dower. But since *Littleton* wrote, by the statute of 27 H. 8. if a joynture be made to [a] the wife, according to the purview of that statute, it is a barre of her dower, so as the woman shall not have both joynture and dower, and to the making of a perfect joynture within that statute sixe things are to be observed. First, her joynture by the first limitation is to take effect for her life in possession of profit presently after the decease of her husband. Secondly, that it be for the terme of her owne life, or greater estate. Thirdly, it must be made to herself, and to no other for her. Fourthly, it must be made in satisfaction of her whole dower, and not of part of her dower. Fifthly, it must either be expressed or averred to be in satisfaction of her dower. And sixthly, it may be made either before or after marriage.

Concerning the first, if a man make a feoffment in fee of lands or tenements either before or after marriage to the use of the husband for life, and after to the use of A. for life, and then to the use of the wife for life in satisfaction of her dower, this is no joynture within the statute, because by the first limitation it was not to take effect in possession or profit presently after the death of her husband. And albeit in that case A. should die living the husband, and after the death of the husband the wife entrench, yet this is no barre of her dower, but she shall have her dower also (2), because it is not within the said statute, and (as it hath been said) by the common law it was no barre of her dower (3). 2. It must be either in fee taile, or for terme of her own life, for an estate for life or lives of one or many other, or to her for a hundred or a thousand yeares, &c. if she lives so long, or without such limitation, is no barre of her dower, albeit they be expressly made in satisfaction of her dower, *causâ quâ supra* (4). 3. If an estate be made to others in fee simple, or for her life upon trust, so as the estate remaine in them, albeit it be for her benefit, and by her assent, and by expresse words to be in full satisfaction of her dower, yet is this no barre of her dower (5). The fourth is so plaine as it needeth not any example. 5. A devise by will cannot be averred to be in satisfaction of her dower, unless it be so expressed in the will (6). 6. If the joynture be made before marriage, the wife cannot waive it and claime her dower at the common law; but if it be made after marriage, she may waive the same, and claime her dower (7). I have touched these points the more summarily, because they are resolved at large with the reasons thereof in *Vernon's case ubi supra*. So as to comprehend all in few words, a joynture (which in common understanding extendeth as well to a sole estate as to a joynt estate with her husband) is a competent livelihood of freehold for the wife of lands or tenements, &c. to take effect presently in possession or profit after the decease of her husband for the life of the wife at the least, if she herself be not the cause of determination of forfeiture of it. Which see more at large in *Vernon's case ubi supra*. If a joynture be made to a wife of lands before the coverture, and after the husband and wife alien by fine those lands so conveyed for her joynture, she shall not be endowed of any of the other lands of her husband. But if the joynture had been

(2) T. 26. Jac. *Sherwell's case*. *Hutt.*  
51. accord.—Hal. MSS.  
(3) [See Note 223.]  
(4) Vid. M. 29 and 30 Eliz. C. B.  
Rot. 334. Devise to the wife for 7 years,—

Hal. MSS.  
(5) [See Note 226.]  
(6) [See Note 227.]  
(7) [See Note 228.]

been made after marriage, notwithstanding the alienation by the husband and wife thereof by fine, yet seeing her estate was originally waivable, and the time of her election came not till after the decease of her husband, she may claim her dower in the residue of his lands. But in the other case, the jointure of the wife made before marriage was not waivable at all. Now as the dower *ad ostium ecclesie* and *ex assensu patris*, is better for the wife, because in respect of the certainty she may enter, than the dower at the common law, where she is driven to her reall action, and therefore *Britton* calleth dower *ad ostium ecclesie*, and *ex assensu patris* establishment of dower by the husband and assignment of dower after his decease (for nothing that is uncertaine is established); so a joynture (that hath the force of a barre of dower by the said act of 27 H. 8.) is, as hath been said,

[37. a.] more sure and safe for the wife than either dower *ad ostium ecclesie*, or *ex assensu patris*, for besides it is as certaine as those others, and she may enter into it, after the death of her husband, and not be driven to her action. She shall not be barred of her joynture albeit her husband commit treason or felonie, as she shall be both of her dower *ad ostium ecclesie* and *ex assensu patris* by the common law. But now at this day by the statutes of 1 E. 6. cap. 12. and 5 E. 6. cap. 11. a wife shall not lose any title of dower which to her was accrued, by the attainder of her husband by any manner of murder or other felonie whatsoever. But [a] if the husband be attainted of high treason or petit treason she shall be [b] barred of her dower at this day, so long as that attainder standeth in force.

"*Conclude*" commeth of the [c] verbe *concludo*, which is derived of *con* and *claudo* to determine, to finish, to shut up, to estoppe or barre a man to plead or claime any other thing. *Vid. Estoppel.*

Stat. cap. 102, 103.

Bract. 311. lib. 4.  
Britton, ca. 15.

1 E. 6. ca. 12.  
5 E. 6. ca. 11.  
(Post. 40. b.)

[a] Stanford,  
108. b.

[b] *Vid. in the*  
Chapter of Guaranty, Sect.

[c] Pl. Com.  
276. b. per Walsh.  
*Vide* Sect. 693,  
695. 667. 679.

## Sect. 42.

**E**T nota, que nul feme serra endow ex assensu patris en le forme avant dit, mes lou sa baron est fils et heire apparent a son pier. Quere de ceux deux cases de dowment ad ostium ecclesie, &c. si la feme, al temps del mort sa baron, ne passe l'age de ix. ans, si el avera dower ou non.

**A**ND note, that no wife shall be endowed *ex assensu patris* in forme aforesaid, but where her husband is sonne and heir apparant to his father. *Quere* of these two cases of dowment *ad ostium ecclesie*, &c. if the wife, at the time of the death of her husband, be not past the age of 9 yeares, whether she shall have dower or no.

"*NUL feme serra endow, &c.*" Of this sufficient hath beene said before.

(Ante 33. a.)

"*Quere de ceux deux cases de dowment ad ostium ecclesie, &c.*" And it seemeth, that these dowers being made by assent, &c. that the same are good albeit the wife be within the age of nine yeares, for *Consensus tollit errorem*. But without question, a joynture made to her under or above the age of nine yeares, is good.

## Sect. 43.

**ET** nota, quē en tous casz lou le certainty appiert queux terres ou tenements feme avera pur sa dower, la le feme poit entrer apres la mort sa baron sans assignement de nulluy. Mes lou le certaintie ne appiert, si come d'estre endow de la tierce part, d'aver en severallie, ou del moitie solongue le custome de tener en severallie, en tielz casz il covient que sa dower soit a luy assigne apres le mort del baron; pur ceo que non constat devant assignement, quel part des terres ou tenements el avera pur sa dower.

**A**ND note, that in all cases, where the certaintie appeareth what lands or tenements the wife shall have for her dower, there the wife may enter after the death of her husband without assignement of any. But where the certaintie appeares not, as to be endowed of the third part, to have in severalty, or the moiety according to the custom to hold in severallie, in such cases it behoveth that her dower be assigned unto her after the death of her husband; because it doth not appeare before assignement, what part of the lands or tenements she shall have for her dower.

**"ET** nota, que en tous casz, &c." In all cases, where the demand of the dower is certaine, as in case of dower *ad ostium ecclesie* or *ex assensu patris*, there the wife after the death of the husband may enter (1). But where the demand is uncertaine, as in writs of dower at the common law, there albeit the thing it selfe be certaine, yet shall she not take it without assignement. As if a woman bring a writ of dower of three shillings rent, albeit she ought to be endowed of one shilling, yet cannot she after judgment distrein for twelve pence before assignement (2), because the demand was uncertaine. And so it is if two tenants in common be, [37. b.] and the wife of one of them bring a writ of dower to be endowed of a third part of a moiety, and have judgement to recover, yet cannot she enter without assignement, albeit the assignement cannot give her any certainty, because her husband's state was incertain. See more of this before Section 34.

40 E. 3. 22. 43.  
45 E. 3. 4.  
20 E. 3.  
barre 132.  
9 E. 3.  
Entry 76.

(Ant. 34. b.)

## Sect. 44.

**MES** si soient deux jointenanis de certaine terre en fee, et l'un alien oco que a luy affiert, a un autre en fee, que prent feme, et puis devie; en ceo cas la feme pur sa dower avera le tierce part de la moitie que sa baron ad purchase, a tener en common (come sa part amoũtnera) oresque l'heire sa baron, et oresque l'auter jointenant, que ne aliena pas, pur ceo que en tiel cas sa dower, ne poit estre assigne per metes et bounds.

**B**UT if there be two joyntenants of certaine land in fee, and the one alieneth that which belongeth to him, to another in fee, who taketh a wife, and after dieth; in this case the wife for her dower shall have the third part of the moiety which her husband purchased, to hold in common (as her part amounteth) with the heire of her husband, and with the other jointenant, which did not alien, for that in this case her dower cannot be assigned by metes and bounds.

Of

(1) It seems, that though it be assigned, the freehold is not in her till entry. 9 E. 3. 5.—

Hal. MSS.

(2) [See Note 229.]

Of this sufficient hath beene said before, and that in this case the wife cannot enter without assignement.

## Sect. 45.

**E**T est ascavoir, que la feme ne serrà my endow de terres ou tenements, que sa baron tient jointement ouesque un autre al temps de son morant; mes lou il tient en commun, autrement est, come en le cas prochain avantdit.

**A**ND it is to be understood, that the wife shall not be endowed of lands or tenements, which her husband holdeth joyntly with another at the time of his death; but where he holdeth in common, otherwise it is, as in the case next abovesaid.

**T**HE reason of this diversity is, for that the jointenant, which surviveth, claimeth the land by the feoffment, and by survivorshippe, which is above the title of dower, and may plead the feoffment made to himselfe without naming of his compaignon that died, as shall be said hereafter in his proper place; but tenants in common have several freeholds and inheritances, and their moities shall descend to their several heires, and therefore their wives shall be indowed. (L. Ro. Abr. 676.)

[38. a.]

## Sect. 46.

**E**T est ascavoir, que si tenant en le taile endowa sa feme ad ostium ecclesie, come est avantdit, ceo servera pur petit ou rien al feme, pur ceo que apres la mort sa baron, l'issue en le taile puit entrer sur le possession la feme: et issint puit celuy en le reversion, si ne soit issue en le taile en vie, &c.

**A**ND it is to be understood, that if tenant in taile endoweth his wife at the church doore, as is aforesaid, this shall litle or nothing at all availle the wife, for that after the decease of her husband, the issue in taile may enter upon her possession; and so may he in the reversion, if there be no issue in taile then alive.

**T**HE reason of this is, for that tenant in taile is restrained by the sayd statute of 13 E. 1. *de donis conditionalibus*.

And so did our author take the law in his learned reading. Here our author's reason is *à fine*, and therefore such an endowment is not to be made because it is to no end. Vide Sect. 194.

## Sect. 47.

**A**UXY, si home seisie en fee simple, esteant deins age, endowa sa feme al hui del monasterie ou d'eglise, et devie, et sa feme enter, en ceo cas l'heire le baron luy puit ouster. Mes autrement est (come il semble) lou le pier est seisie en fee, et le fils deins age endow sa feme ex assensu patris,

**A**LSO, if a man seised in fee simple, being within age, endoweth his wife at the monasterie or church doore, and dieth, and his wife enter, in this case the heire of the husband may out her. But otherwise it is (as it seemeth) where the father is seised in fee, and the sonne within

tris, le pier donque estcant de plein  
age.

within age endoweth his wife *ex  
assensu patris*, the father being then  
of full age.

THE reason of this diversitie is, for that in the first case the husband within age is seised, and therefore he being within age cannot by a voluntary act bind himselfe: otherwise it is, where he doth an act whereunto he is compellable by law, but in the latter case the father which giveth the assent is seised of the freehold and inheritance, and the sonne therein hath nothing, and therefore his heire shall not avoide it in respect of his infancy.

Vid. 9 H. 3.  
Ch. dower 197.

(Ante 34. a.)

### Sect. 48.

**A**UXY, il y ad un auter endowment, que est appel dowerment de la plus beale. Et ceo est come en tiel case que home seisie de xl. acres de terre, et il tient vint acres de les dits xl. acres de terre, d'un per service de chivalrie, et les autres vint acres de terre d'un auter en socage, et prent feme, et ont issue firs, et morust, son firs esteant deins l'age de xiiii. ans, et le seignieur de que la terre est tenus en chivalrie entre en les xx. acres tenus de luy, et eux ad come gardein en chivalrie durant le nonage l'enfant et la mere de l'enfant enter en le remnant, et ceo occupie come gardein en socage: si en tiel case le feme port brieve de dower envers le gardein en chivalrie, d'estre endow de les tenements tenus per service de chivalier, en le court le roy, ou en auter court, le gardein en chivalrie puit pleder en tiel case tout cest matter, et monstre coment la feme est gardein en socage, come devant est dit; et prie que serra adjudge per la court, que le feme luy mesme endowera de la plus beale de les tenements que el ad come gardein en socage, solongue le value de le tierce part que el claime d'aver de les tenements tenus en chivalrie per sa brieve de dower. Et si la feme ceo ne puit dedire, donques le judgement serra fait, que le gardein en chivalrie tiendra les terres tenus de luy durant le nonage l'enfant quit de le feme, &c. (1).

**A**Lso, there is another dower, which is called dowerment *de la plus beale*. And this is in case where a man is seised of forty acres of land, and he holdeth twenty acres of the said forty acres, of one by knights service, and the other twenty acres of another in socage, and taketh wife, and hath issue a sonne, and dieth, his sonne being within the age of fourteene yeares, and the lord of whom the land is holden by knights service entreth into the twenty acres holden of him, and holdeth them as gardein in chivalrie during the nonage of the infant, and the mother of the infant entreth into the residue, and occupieth it as gardein in socage: if in this case the wife bringeth a writ of dower against the gardein in chivalry, to be endowed of the tenements holden by knights service, in the king's court, or other court, the gardein in chivalry may pleade in such case all this matter, and shew how the wife is gardein in socage, as aforesaid; and pray that it may be adjudged by the court, that the wife may endow her selfe *de la plus beale*, i. e. of the most faire of the tenements which she hath as gardein in socage, after the value of the third part which she claimes by her writ of dower, to have the tenements holden by knights service. And if the wife cannot

(1) Et que la feme poet endower lui meme de la plus beale partie de la terres, qu'ele ad

come gardein en socage a le value, &c. L. and M.



cannot gainsay this, then the judgement shall be given, that the gardein in chivalry shall hold the lands holden of him during the nonage of the infant quit from the woman, &c.

**E**T le seignior de que le terre est tenu en chivalrie enter en les vint acres tenus de luy." For he is not possessed as a gardein against whom a writ of dower lieth, untill he doth enter. Of the wardship of the body he is possessed before seisure, because [38.b.] it is transitory, but he is not possessed of the land untill he enter, because it is permanent. And therefore if he doth not enter, the heire within age may assigne dower, as hath been said, and as it appeareth afterwards.

(Ante 35.)  
Vid. le statut. de bigamis, cap. 3.

"Si en tiel case el fort breve de dower envers le gardein en chivalrie." Albeit [a] the gardein in chivalrie or the grantee of the king of a wardship hath but a chattle during the minority of the heire, and the woman shall recover a freehold in her writ of dower, yet after the gardein as is aforesaid hath entered into the land, that writ lieth against him, and not against the heire who is tenant of the freehold, because the law hath trusted the gardein to plead for the heire within age, and that is in his custody, and also for his own particular interest, and by this diversity all the bookes be reconciled (1).

[a] 44 E. 3. 13.  
4 H. 6. 11.  
Stanf. p. 100.  
6 E. 3. 16.  
16 E. 3.  
breve 667.

Temps E. 1.  
breve 863.  
11 E. 3.  
breve 473.  
45 E. 3. 5.  
17 E. 3. 70.  
1 H. 7. 17.  
4 H. 7. 17.  
4 H. 7. aid le Roy  
Dower 16. (9 Co. 17.)

33. 38 E. 3. 13. 9 H. 6. 6. b. 29 E. 3. 2. 8 E. 2. Dower 109. 8 E. 2. breve 809. 23 E. 4. Dower 16. (9 Co. 17.)

So likewise if the gardein die, the wife shall have a writ of dower against his executors; and if there be two executors, and one of them alone take the profits, the writ of dower shall be maintained against him only. If a man be possessed of the wardship of certaine land, either joyntly with his wife or in the right of his wife, yet the writ of dower lieth against the husband only. Gardein in socage shall not endow herselfe *de la plus beale* without judgement, as shall be said hereafter.

8 E. 3. 22.

8 E. 3. 15.  
8 E. 3. 1.  
38 E. 3. 37.  
47 E. 3. 9. b.

"Le gardein en chivalrie poit pleader." The authority of Littleton is direct that the gardein may plead this plea. But hereof ariseth two questions. First, whether if the heire be vouched by the tenant in the writ of dower in the gard of the gardein (2), whether he coming in as vouchee may plead that plea. The second is,

[39.a.] whether if the gardein in socage have not sufficient, as if the land holden by service of chivalry be thirty acres, and the lands holden in socage but five acres, whether she shall be endowed by parcels, viz. to recover five acres against the gardein in chivalry, and to retaine five acres. And as to the first, the gardein shall as well plead it, when he comes in as vouchee, as when he is tenant. And as to the second, some say that the demandant in the writ of dower must have assets in her hands to the value of her dower, so as she shall not be partly endowed against the gardein, and partly retaine in her owne hands. And they say, that the judgement should be in part, that is, as to the land in socage in severalty, and as to the land in chivalry to recover the third part, and compare it to the case in 8 E. 4. 3. that damages shall not be recovered, partly against the defendant in an appeale, and partly against the abettors, but entirely either against the one or the other. And Littleton here putteth

a. 6. 39 E. 3. 2.  
8 E. 2. Dower.  
169. 8 E. 2.  
Creve 809.  
23 E. 4.

8 E. 3. 30.  
3 E. 3. 31. Lib.  
Intrat. Dower,  
fol. 225. a.  
28 E. 3. 4. h.

14 H. 7. 26.  
Keeble.  
(12 Co. 125, 125.)

(1) [See Note 230.]

(2) [See Note 231.]

putteth this case that the gardein in socage hath assets in value, and seeing it is a dower against common right, they hold that she must be entirely endowed either by herselfe against common right, or against the gardein according to common right. But [a] yet by the booke in 25 E. 3. 52. b. and others it appeareth, that she may in this very case retaine for part, and recover against the gardein for part (2).

Gardein in chivalry [b] shall plead in barre of her dower, detainment, or eloining of the body of the ward, because his marriage doth appertain unto him : and if the heire come in [c] as vouchec, he shall plead the same plea. But he shall not plead detainment of the charters, [d] because the charters concerning the inheritance of the heire belong not to the gardein (3). The gardein in chivalry [e] may assigne dower of the lands and tenements he hath in ward, or if he assigne a rent out of those lands in allowance of her dower, it is good. If the gardein in chivalrie assigne too much for her dower, the heire shall have a writ of admesurement by the common law (4). And so [f] if the heire within age assigne, before the gardein enter, to the wife too much in the dower, the gardein shall have a writ of admesurement by the statute of West. 2. cap. 7. And if the heire within age, before the gardein enter into the land, assigne too much in dower, he himselfe shall have a writ of admesurement at full age : and some have said, that in that case he may have it within age. [g] But if the heire (before the gardein enter) endow the wife of more than she ought, and the gardein assigne over his estate, his assignee shall have no writ of admesurement, because it was a thing in action. Also, the heire shall have an [h] admesurement for the assignment in the life of his ancestor, by the common law, [i] and a writ of admesurement lyeth upon an assignment in chancery.

“ *Donques le judgement serra fait que le gardein en chivalrie riendra les terres tenus de luy durant le nonage l'enfant quit de la feme, &c.* ”

“ *Judgement.* ” *Judicium, quasi juris dictum*, the very voyce of law and right, and therefore *Judicium semper pro veritate accipitur*. The ancient words of judgement are very significant, *Consideratum, est, &c.* because that judgement is ever given by the court upon due consideration had of the record before them : and in every judgement there ought to be three persons, *actor, reus, and judex*. Of judgements some be finall, and some not finall, whereof you shall read more hereafter. And now to returne to our author, it is materiall that these words (*et cetera*) be explained at large, viz. *Et quoddam prædicta A. (the demandant) casuat de terris hered' prædicta in custodiâ suâ existen' ad valentiam præd' 3. partis cum pertinen' tenend' nomine dotis suæ pro præd' 3. parte usurarius per eam petit* (5). Now some

[a] 25 E. 3.  
25 b.  
4 E. 2. tit.  
dischisin.  
10. Regist.  
Judic. 56. Lib.  
Intrat. 22.  
16 E. 3.  
bave 667.  
20 E. 3.  
judgment. 178.  
[b] 7 E. 3. 67.  
8 E. 3. 71.  
[c] Doc. Pp. 149.  
[d] 17 E. 3. 38.  
[e] 10 E. 3. 80.  
6. El. Dy. 230.  
[f] 3 E. 3.  
Dow. 79.  
8 E. 2.  
Dower 165.  
W. 2. cap. 7.  
[g] F. N. B. 149.  
149.  
[h] Inst. 307.  
[i] Bract.  
2. c. 644.  
Reg. orig. 171.  
Flet. li. 7.  
ca. 22.  
7 E. 2. tit.  
Admes. 23.  
F. N. B. 149.  
[j] 7 R. 2.  
Admes. 4.  
F. N. B. 148. l.  
[k] 7 R. 2. ub. su.  
F. N. B. 149. p.  
[l] 7 R. 2. sub. sup.  
15 H. 6.  
Admes. 4.  
F. N. B. 149.  
25 E. 3. 51.

[1] Ro. Abr. 201.  
Gra. Cha. 422.  
Post. 168. a.)

22 E. 4. Dow.  
16. 16 E. 3.  
Wast. 360.  
45 E. 3. 6.

(2) Vid. 2 E. 3 Vouch. 213. 13 E. 3.  
Judgment 165.—Hal. MSS

(3) Vid. 9. Rep. 15. b. Ann Bedingsfeld's  
case.—Hal. MSS. See further as to pleading  
detainment of charters, Hugh. Orig. Wr. 183.  
Vin. Abr. Dower L. M. and N.

(4) [See further as to admesurement of  
dower, Vin. Abr. Dower Q. a. and as to assign-  
ment in chancery, Hugh. Orig. Wr. 171.  
New Abr. Dower D. 3.

(5) 15 E. 3. Dower 69.—Hal. MSS.

some are of opinion, that upon this judgement the demandant may not in any sort endow herselfe of the land, because she cannot do an act to herselfe, but she shall recoupe the third part of the profits upon her account, and be endowed against the heire at his full age (6). But observe what *Littleton* saith in the next Section: but before you come to that, observe what priviledge the common law

[39. b.] giveth to the land holden by knights service, viz. that it shall not be dismembered, but the whole dower taken of the lands holden in socage; and the reason is, for that knights service is for the defence of the realm, which is *pro bona publico*, and therefore to be favoured.

## Sect. 49.

**ET** nota, que apres tiel judgement done, la feme puit prendre ses vicines, et en leur presence endower luy mesme per metes et bounds de la plus beale part de les tenements que el ad come gardein en socage (1), d'aver et tener a luy pur terme de sa vie; et tiel dower est appel dower de la plus beale.

**A**ND note, that after such a judgement given, the wife may take her neighbours, and in their presence endow herselfe by metes and bounds of the fairest part of the tenements which she hath as gardein in socage, to have and to hold to her for terme of her life; and this dower is called *dower de la plus beale*.

And the judgement, viz. *tenend' nomine dotis*, proveth, that she may have it for terme of her life, for every dower is for terme of life.

## Sect. 50.

**ET** nota, que tiel dowment ne puit este, mes lou le judgement est fait en le court le roy, ou en auter court, &c. (2) et ceo est pur salvation del estate del gardeine en chivalrie durant le nonage l'enfant.

**A**ND note, that such dowment cannot be, but where a judgement is given in the king's court, or in some other court, &c. and this is for the preservation of the estate of the gardein in chivalrie during the nonage of the infant.

**L**OU le judgement est fait, &c." For without such a judgement, as appeareth before, gardeine in socage cannot endow herselfe, as likewise hath bin said before (3).

15 E. 3.  
Dower 69.  
16 E. 3. tit.  
Wart. 100.

"Ou en auter court." That is, by writ of right of dower in the court of the heire, if he have any, or of the lord of whom the land is holden.

Bract. lib. 329.  
F. N. B. 7. 8.

"Et ceo est pur salvation del estate del gardein en chivalrie durant le nonage de l'enfant." For the heire (before the entre of the gardein)

(6) [See Note 232.]

&c. ad ceo. L. and M.—Roh.—P. and Red.

[39. b.]

(1) A le valisme de le tierce partie des tenementes que le gardeyn en chevalerie ad,

(2) Que la feme ceo puit faire, L. and M.—Roh.

(3) [See Note 233.]

dein) cannot plead the same plea, that the demandant should endow herselfe *de la plus beale*. And the reason of this dower *de la plus beale* to be all of the socage land, was for advancement of chivalrie for the defence of the realme (4).

## Sect. 51.

**E**T issint poyes veier cinque maners de dower, scilicet, dower per le common ley, dower per le custome (5), dower ad ostium ecclesie, dower ex assensu patris, et dower de la plus beale.

**A**ND so you may see five kinds of dower, viz. dower by the common law, dower by the custome, dower *ad ostium ecclesie*, dower *ex assensu patris*, and dower *de la plus beale*.

This is manifest of itselfe, and therefore needeth no explanation.

## Sect. 52.

[40. a.]

**E**T memorandum, que en chescun case lou home prent feme seisie de tiel estate de tenements, &c. issint que l'issue, que il ad per son feme, poit per possibilitie enheriter mesmes les tenements de tiel estate que la feme ad, come heire al feme; en tiel case, apres le mort la feme, il avera mesmes les tenements per le curtesie de Angleterre, et auterment nemy.

**A**ND memorandum, that in every case where a man taketh a wife seised of such an estate of tenements, &c. as the issue, which he hath by his wife, may by possibility inherit the same tenements of such an estate as the wife hath, as heire to the wife; in this case, after the decease of the wife, he shall have the same tenements by the curtesie of England, but otherwise not.

Sect. 234. 301. 335.  
Ante. 29. b.

[a] 21 E. 3. 9.  
11 H. 7.  
3 H. 7. 17.  
Stamf. 195.  
27 E. 3. 77.  
46 E. 3.  
Petit 20.  
26 Ass. p. 2.  
13 H. 4. 8.

**"MEMORANDUM"** This word doth ever betoken some excellent point of learning, which our author hath used in other places, as appeareth in the margin.

The matter hereof hath bin partly explained in the Chapter of Tenant by the Curtesie. If a man [a] taketh a wife seised of lands or tenements in fee, and hath issue, and after the wife is attainted of felony so as the issue cannot inherit to her, yet he shall be tenant by the curtesie, in respect of the issue which he had before the felonie, and which by possibilitie might then have inherited. But if the wife had been attainted of felonie before the issue, albeit he hath issue afterward, he shall not be tenant by the curtesie (1).

**"Come heire al feme."** This doth implie [b] a secret of law, for except the wife be actually seised, the heire shall not (as hath been

[b] 8 Co. 34.  
in Paine's case.

(4) Vid. 16 E. 3. 88. She may recoup the third part of the profits on her own account, ut videtur, without judgment. Hal. MSS.

(5) Besides the books cited ante 33. b. as to dower by custom, see Hugh. Orig. Wr. 160. Robins. Gavelk. cap. 2. New

Abr. Dower K. Vin. Abr. Copyhold H. e.  
Com. Dig. Copyhold K. 2.

[40. a.]

(1) See ante 29. b. a. 4. and Vin. Abr. Curtesy, H.

been said) make himselfe heire to the wife (2): and this is the reason that a man shall not be tenant by the curtesie of a seisin in law.

## Sect. 53.

**ET** auxy, en chescun case lou la feme prent baron seisle de tiel estate des tenements, &c. issint que si per possibilitie il puissoit happer que si le feme avoit aucun issue per le baron, et que mesme l'issue puissoit per possibilitie enheriter mesme les tenements de tiel estate que le baron ad, come heire a le baron, de tiels tenements el avera sa dower, et autrement nemy. Car si tenements sont dones a un home, et a les heires que il engendra de corps sa feme, en tiel case la feme n'ad riens en les tenements, et le baron ad estate forsque come donee en especial taile. Uncore si le baron decy sans issue, mesme la feme serra endow de mesmes les tenements; pur ceo que l'issue, que el per possibilitie puissoit aver per mesme le baron, puissoit enheriter mesmes les tenements. Mes si la feme deust, vivant sa baron, et puis le baron prist auter feme, et morust, sa second feme ne serra my endow en cest case, causâ qua supra.

**AND** also, in every case where a woman taketh a husband seised of such an estate in tenements, &c. so as by possibilitie it may happen that the wife may have issue by her husband, and that the same issue may by possibilitie inherit the same tenements of such an estate as the husband hath, as heire to the husband, of such tenements she shall have her dower, and otherwise not. For if tenements be given to a man, and to the heires which he shall beget of the bodie of his wife, in this case the wife hath nothing in the tenements, and the husband hath an estate but as donee in special taile. Yet if the husband die without issue, the same wife shall be endowed of the same tenements; because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife dyeth, living her husband, and after the husband takes another wife, and dieth, his 2. wife shall not be indowed in this case, for the reason aforesaid.

**ISSINT** que si per possibilitie il puit happer que si le feme avoit aucun issue per son baron." Albeit the wife be a hundred yeares old, or that the husband at his death was but foure or seven yeares old (3), so as she had no possibilitie to have issue by him, yet seeing the law saith, that if the wife be above the age of nine years at the death of her husband, she shall be endowed, and that women in ancient times have had children at that age, whereunto no woman doth now attaine, the law cannot judge that impossible, which by nature was possible. And in my time, a woman above [40. b.] threescore yeares old hath had a child, and *ideo non definitur in jure*. And for the husband's being of such tender yeares, he hath *habitus*, though he hath not *potentiam* at that time, and therefore his wife shall be endowed.

12 H. 4. 2.  
7 H. 6. 11, 12.

(1. Ro. Abr. 667.)

"Et

(2) See 8. Co. 36. a. where 11 H. 4. 11. and 40 E. 3. 9. are cited to prove this doctrine. See also ante 11. b. where it is advanced as a general rule, that he who claims by descent, must make himself heir to the person last

actually seised. See further ante 14. b. 15. b. and n. 3. in 11. b. W. Jo. 361. and Blackst. Law. Tr. 8vo. ed. vol. 1. p. 180.

(3) See ante 33. a.

"*Et que meisme l'issue fuinsoit per possibilitie inheriter meemes les tenements, &c.*" A man seised of land in generall taile, taketh wife, and after is attainted of felony, before the said statute of 1 E. 6. the issue should have inherited, and yet the wife should not have bin endowed; for the statute of W. 2. ca. 1. relieveth the issue in taile, but not the wife in that case (1). But at this day, if the husband be attainted of felony, the wife shall be endowed, and yet the issue shall not inherit the lands which the father had in fee simple. If the wife elope from her husband, &c. she shall be barred of her dower, as hath beene said (2), and yet the issue shall inherit (3).

(Ante 37. a.)

(F. N. B. h. 150.  
Ante 32. a.)

## Sect. 54.

5 F. 3.  
Voucher 249.  
5 E. 3. Ass. 293.  
4 H. 6. 24.  
F. N. B. 149.

You may easily perceive by the context that this shaft came never out of *Littleton's* quiver of choice arrowes (4), and therefore I will leave it. Onely for students sake I will referre them to 5 E. 3. Voucher 249. 8 E. 3. Ass. 293. 4 H. 6. 24. F. N. B. 149.

**N**OTA, si un home soit seisie de certaine terres, et prist un feme, et puis aliena mesme la terre ove garantie, et puis le feoffor et le feoffee deviont, et la feme de le feoffor port un action de dower envers le issue le feoffee, et il vouch l'heire le feoffor, et pendant le vouch et nient termine, la feme le feoffee port son action de dower envers le heire le feoffee, et demaunda la tierce part de ceo de que sa baron fuit seisie, et ne voile demaunder le tierce part del eux deux parts de que sa baron fuit seisie; fuit adjudge, que el n'avera jugement tanque l'auter plee fuit determine.

**N**OTE, if a man be seised of certain lands, and taketh wife, and after alieneth the same land with warrantie, and after the feoffor and feoffee dye, and the wife of the feoffor bring an action of dower against the issue of the feoffee, and he vouch the heire of the feoffor, and hanging the vouch and undetermined, the wife of the feoffee brings her action of dower against the heire of the feoffee, and demand the [41. a.] third part of that whereof her husband was seised, and will not demand the third part of these two parts of which her husband was seised; it was adjudged, that she should have no judgement untill such time as the other plea were determined.

## Sect. 55. (1.)

**E**T nota, que *Varisour* dit, que si un home soit seisie de terre et fuit felonie, et puis alien, et puis est attaint,

**A**ND note, *Varisour* saith, that if a man be seised of land and committeth felony, and after alieneth, and

(1) 12 H. 4. 3. by *Hankford*—Hal. MSS. See further as to loss of dower by the husband's offences ante 37. a. post 392. b. *Hugh*. Orig. Wr. 156. and *Vin. Abr. Dower* Q. 6.

(2) See ante 32. a.

(3) See another instance, where the issue shall inherit and yet the wife shall not be endowed, in *Perk.* sect. 317.

(4) Section 54. is neither in the edition by L. and M. nor in the *Roh.* edition. It appears to have been first added in the edition by P.

[41. a.]

(1) Sect. 55. is not in L. and M. nor in *Roh.* but is in P. and the subsequent editions.

*taint, la feme avera bone action de dower envers le feoffee: mes si soit escheate al roy, ou al seignior, el n'avera breve de dower. Et sic vide diversitatem, et quære inde legem.*

and after is attaint, the wife shall have a good action of dower against the feoffee: but if it be escheated to the king, or to the lord, she shall not have a writ of dower. And so see the difference, and inquire what the law is herein.

**T**HIS is also of the new addition, *et explosa est hæc opinio*; for it is cleare in law, that the wife at the common law should not have been endowed against the feoffee. For to deterre and restraine men from committing of treason or felony, the law hath inflicted five punishments upon him that is attainted of treason or felony. 1. He shall lose his life, and that by an infamous death of hanging betweene heaven and the earth, as unworthy in respect of his offence either. 2. His wife, that is a part of himselfe, (*et erunt anima dua in carne una*) shall lose her dower. 3. His blood is corrupted, and his children cannot be heires to him, and if he be noble or gentle before, he and all his posterity are by this attainder made ignoble. 4. He shall forfeit all his lands and tenements; and 5. all his goods and chattels; and all this is included by the law in the judgement, *quod suspendatur per collum*. But this is not intended of all felonies, but of felony by stealing of goods above the value of xii. pence, and not of *petit larceny* under the value (2). So as the woman shall lose her dower as well against the feoffee as against the lord by escheat. And so it was resolved in a writ of dower brought by *Mary Gates* late wife of *John Gates*, who after the coverture had infeoffed *Wiseman* in fee, and after committed high treason, and was thereof attainted, that the wife should not be indowed against the feoffee, and in that case it was resolved, that so it was at the common law in case of felony (3). And it is to be understood, that the wife shall not only lose her reasonable dower at the common law for the felony of her husband, but also her dower *ad ostium ecclesie*, and *ex assensu patris* (4), for felony done after the dower assigned, and dower by custome also (5). And the reason of all this is yeilded by *Littleton* himselfe in the Chapter of Warranties, Section 746. to the end that men should be afraid to commit felony. But at this day the wife of a man attainted of felony (as often hath been said) shall be endowed by force of the statutes in that case provided.

And it appeareth by *Britton*, *que fem de homicide ne teigne nul dower de tenants que lour fuit assigne per lour barons*, so as the wife of a felon attainted by the common law was disabled to recover dower *ad ostium ecclesie*, and *ex assensu patris*, as well as her reasonable dower which the common law gave her. See in *Bracton* many barres of dower as the law was then held.

Vide Sect. 746.  
Vide Britton,  
cap. 109. l. 1.  
Bracton title  
Evidens, l. 4.  
fo. 397. 30. 311.  
Samm. pl. ear.  
194, 195  
Britton, fol. 15.  
cap. 2.

Vide Sect. 746.

(1. Leon. 3.)

M. 3. & 4. Ph.  
& Mar. Ro. 760.  
in com. baues.  
8 E. 3. 20.  
13 H. 4. 30.

Bracton, lib. 4.  
fol. 311.

Vide Sect. 746.  
Britton, cap. de  
Homicide, fo. 15.  
Bracton, lib. 4.  
fol. 306. &  
Fleta ubi supra,  
& Britton ubi  
supra.

(2) But outlawry in trespass doth not bar.  
3 E. 3. 7. 41. Hal. MSS.  
(3) [See Note 234.]

(4) [See Note 235.]  
(5) [See Note 236.]

## CHAP. 6.

## Tenant a terme de vie.

## Sect. 56. [41. b.]

**T**ENANT pur terme de vie est, lou home lessu terres ou tenemens a un auter pur terme de vie le lessee, ou per terme de vie d'un auter home. En tiel case le lessee est tenant a terme de vie. Mes per common parlance celui que tient pur terme de sa vie demesne, est appel tenant pur terme de sa vie; et cestuy que tient pur terme d'auter vie, est appel tenant pur terme de auter vie.

**T**ENANT for term of life is, where a man letteth lands or tenements to another for terme of the life of the lessee, or for terme of the life of another man. In this case the lessee is tenant for terme of life. But by common speech he which holdeth for terme of his owne life, is called tenant for terme of his life; and he which holdeth for terme of another's life, is called tenant for terme of another's man life.

(Cro. Ju. 200. 154.)  
Bract. lib. 2.  
ca. 5. & ca. 9.  
fol. 26.

Fleta, lib. 3. ca. 13.  
Britton, fol. 83.  
Bracton, lib. 4.  
fo. 170.

Vide Sect. 381.

[a] Vide le Deane  
de Worcester. case,  
6. Co. 37.

27 Ass. 31.

39 E. 3. 1.

27 H. 6.

Recognizance.  
Stattham pl.  
ultima.

38 H. 6. 27.

Bracton, lib. 2.

fo. 9. Britton,

fo. 84. 85.

Vaugh. 180, 190.

(Cro. El. 407.

[b] 27. Ass. p. 31.

& Pl. Com. fo. 28.

b. in Colthorpe's

case, tit. Barre 303.

(Cro. Jam. 261.

Mo. 394.

Cro. Eliz. 57.

Mo. 664.

Cro. Jam. 289.)

[c] Littleton 167.

11. H. 4. 42.

17 E. 3. 49.

39 E. 3. 25.

7 H. 4. 46.

7 H. 4. 15.

Dier. 8 Eliz. 253. (2. Ro. Abr. 150, 151. 1. Ro. Abr. 844. 1. Leon. 126. Post. 239. a.)

[d] Bract. lib. 4.

fo. 222. 231.

Fleta, lib. 4.

ca. 19. 24, 26, 27. ]

233. & vid.

fo. 126, 127.

8 E. 3. 64. 55.

21 E. 3. 41.

48 E. 3. 31.

7 E. 4. 28. 21 H. 6. 46. 10 E. 4. 3. F. N. B. 180. 4. Co. 86. 27. in Luttrell's case.

“ **O**U per terme de vie d'un auter home.” Now it is to be understood, that if the lessee in that case dieth living *cestuy que vie* (that is, he for whose life the lease was made), he that first entreteth shall hold the land during that other man's life, and he that so entreteth is within *Littleton's* words, viz. *tenant pur auter vie*, and shall be [a] punished for waste as tenant *pur auter vie*, and subject to the payment of the rent reserved, and is in law called an *occupant* (1) (*occupans*), because his title is by his first occupation. And so if tenant for his owne life grant over his estate to another, if the grantee dyeth there shall be an *occupant*. In like manner it is of an estate created by law [b]; for if tenant by the curtesie or tenant in dower grant over his or her estate, and the grantee dieth, there shall be an *occupant* (2). But against the king there shall be no *occupant*. because *nullum tempus occurrit regi*. And therefore no man shall gain the king's land by priority of entry. There can be no *occupant* of any thing that lyeth in grant (3), and that cannot passe without deed, because every *occupant* must claime by a *que estate*, and averre the life of *cestuy que vie* (4). It were [c] good to prevent the incertainty of the estate of the *occupant* to adde these words (to have and to hold to him and his heires during the life of *cestuy que vie*), and this shall prevent the *occupant*, and yet the lessee may assigne it to whom he will; or if he hath already an estate for another man's life without these words, then it were good for him to assigne his estates to divers men and their heires during the life of *cestuy que vie* (5).

Note, that [d] to every tenant for life, the law as incident to his estate without provision of the party giveth him three kinde of *estovers*, (that is) *housbote* which is twofold, viz. *estoverium edificandi et ardendi*, *ploughbote* that is *estoverium arandi*, and lastly *haybote*, and that

(1) [See Note 237.]

(4) [See Note 240.]

(2) [See Note 238.]

(5) [See Note 241.]

(3) [See Note 239.]



that is *estoverium claudendi*, and these estovers must be reasonable, *estoveria rationabilia*. And these the lessee may take upon the land demised without any assignement, unlesse he be restrayned by speciall covenant (6), for *modus et conventio vincunt legem*. Bote in the *Saxon* tongue, and *estovers* in the *French*, in this case are all of one signification, that is, to have compensation or satisfaction for these purposes. *Estovers* commeth of the *French* word *estover*. And the same estovers that tenant for life may have, tenant for years shall have.

(11. Co. 46.)

You have perceived, that our author divides tenant for life into two branches, viz. into tenant for terme of his own life, and into tenant for terme of another's man life: to this may be added a third, viz. into an estate both for terme of his own life, and for terme of another man's life.

Vide Sect. 381.

As if a lease be made to *A.* to have to him for terme of his owne life, and the lives of *B.* and *C.* for the lessee in this case hath but one freehold, which hath this limitation, during his owne life, and during the lives of two others. And herein is a diversity to be observed betweene several estates in several degrees, and one estate with several limitations. For in the first, an estate for a man's owne life is higher than for another man's life, but in the second it is not. As if *A.* be tenant for life, the remainder or reversion to *B.*

Rouse's case,  
5. Co. 13.  
(5. Co. 9. b.)

[42. a.] for life, *A.* may surrender to *B.* for the estate of *B.* for terme of his own life is higher than an estate for another man's life: and therefore if tenant for life infeoffe him in the remainder for life, this is a surrender, and no forfeiture. And albeit an estate for terme of a man's own life be but one freehold, yet may severall freeholds in certaine cases be derived out of the same, whereof our bookes are very plentiful, and whereof you may disport yourselves for a time. As if tenant for life maketh a lease by deed, or without deed, to him in the remainder, or reversion, in taile or in fee, for the term of the life of him in the remainder or reversion, and after he in the remainder taketh wife and dieth, his wife shall not be endowed, for tenant for life shall enjoy the land again; for forfeiture it cannot be, for he in the remainder was party; and surrender it cannot be, for that his whole estate was not given (1).

(Ante 31. b.  
post. 273. b.)  
24 E. 3. 32. & 68.  
30 Ass. p. 47.  
19 E. 3. Sur. 8.  
(1. Co. 76. b.)  
13. R. 2.  
Dow. 95.  
7 H. 6. 3.  
per Cur.  
18 E. 3. 48.  
(2. Ro. Abr. 497.  
Post. 335. a.)

The heire maketh a lease for life, reserving a rent, against whom the wife recovereth her dower and dieth, the lessee shall have the land againe for life, and the rent is revived.

7 H. 5. 4.

So it is, if tenant for life take husband and by deed indented they make a lease to him in the reversion for the life of the husband, reserving a rent, this is neither forfeiture, nor absolute surrender, for the cause aforesaid, and the reservation is good.

20. Ass. p. 64.

*B.* seised of lands in fee, taketh to wife *Is.* and infeoffes *C.* in fee, who takes *Alice* to wife: *C.* dieth, *Alice* is endowed; *B.* dieth *Is.* recovereth dower against *Alice* and dieth, *Alice* shall enjoy the land againe during her life (2).

3 F. 2.  
Ass. 393.  
45 E. 3. 13.

*A.* and [a] *B.* joyntenants, *A.* for life, and *B.* in fee, joyne in a lease for life (3), *A.* hath a reversion, and shall joyne in an action of wast (4).

[a] 2 H. 5. 7.  
13 H. 7. 15.  
18 E. 2. br. 835.  
F. N. B. 59. C.

Tenant

(6) But affirmative covenants do not restrain. 28 H. 8. Dy. 19. Hal. MSS.

[42. a.]

(1) [See Note 242.]

(2) Hic fol. 21. Hal. MSS.

(3) 13 E. 4. 4. Dy. 237. So of a gift in tail. 38 E. 3. 7. Hal. MSS.

(4) And the writ ought to be ad exhibicionem *B.* 13 E. 2. Brief 835. Hal. MSS.

[b] 37 H. 8. 13.  
13 H. 7. 15.  
32 H. 6. 34.  
17 E. 3. 9. b.

Tenant for [b] life and he in the reversion joyne in a lease for life, it is said, that they shall joyne in action of wast, and that the lessee for life shall recover the place wasted, and he in reversion, damages (5).

[c] 37 H. 6. 27.  
36 E. 3. 66.  
14 E. 2.  
Grant 92.  
3 E. 3. 15.  
14 H. 8. 13.  
Bracton, lib. 4.  
fo. 207.  
Fleta, lib. 3. ca. 12.  
(1. Ro. Abr. 845.)

If a man grant [c] an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house, or so long as he pay x l. &c. or untill the grantee be promoted to a benefice, or for any like incertaine time, which time, as *Bracton* saith, is *tempus indeterminatum*: in all these cases, if it be of lands or tenements, the lessee hath in judgment of law an estate for life determinable, if livery be made; and if it be of rents, advowsons, or any other thing that lie in grant, he hath a like estate for life by the delivery of the deed, and in count or pleading he shall alledge the lease, and conclude, that by force thereof he was seised generally for terme of his life (6).

(6. Co. 35. b.)

If a man make lease of a manor, that at the time of the lease made is worth xx l. *per annum*, to another until c l. be paid, in this case because the annuall profits of the manor are incertain, he hath an estate for life, if livery be made determinable upon the levying of the c l. (7). But if a man grant a rent of xx l. *per annum* until c l. be paid, there he hath an estate for five yeares, for there it is certaine, and depends upon no incertainty. And yet in some cases a man shall have an incertaine interest in lands or tenements, and yet neither an estate for life, for yeares, or at will (8). As if a man by his will in writing, devise his lands to his executors for payment of debts, and until his debts be paid; in this case the executors have but a chattell, and an incertaine interest in the lands untill his debts be paid; for if they should have it for their lives, then by their death their estate should cease, and the debts unpaid; but being a chattell, it shall go to the executors of executors for the payment of his debts: and so note a diversity betwene a devise and a conveyance at the common law in his life time. And tenant by statute merchant, by statute staple, and by *elegit*, have incertaine interests in lands or tenements, and yet they have but chattells, and no freehold, whose estates are created by divers acts of parliament, whereof more shall be said hereafter. And so have gardians in chivalry which hold over for single or double value incertaine interests, and yet but chattells.

33. Ass. p. 2.  
(Flow. 273.)

3. Co. 94. b.  
Manning's case.  
3 H. 7. 13.  
27 H. 8. 8.  
14 H. 8. 13.  
21. Ass. p. 8.

Vid. Sect. 381.  
7. Ass. Pl. 1.  
13. El. Dyer 300.

7 E. 4. 23.  
(8. Co. 85. b.  
Post. 233. a.)

If one grant lands or tenements, reversions, remainders, rents, advowsons, commons, or the like, and expresse or limit no estate, the lessee or grantee (due ceremonies requisite by law being performed) hath an estate for life (9). The same law is of a declaration of a use (10). A man may have an estate for terme of life determinable at will; as if the king doth grant an office to one at will, and grant a rent to him for the exercise of his office for terme of his life, this is determinable upon the determination of the office.

Vide Sect. 381.  
(1. Ro. Abr. 845.)

A. tenant in fee simple, makes a lease of lands to B. to have and to hold to B. for terme of life, without mentioning for whose life it shall

(5) 3 H. 7. 9. P. 43 Eliz. C. B. D. D.  
n. 4. But if the lease be without deed it is a  
surrender. 10 H. 7. 3. 1. Rep. Bredon's  
case. Hal. MSS.

(6) [See Note 243.]

(7) [See Note 244.]

(8) Plowd. Comment. 273. Hal. MSS.

(9) [See Note 245.]

(10) 21 H. 5. by Shelly. Hal. MSS.

shall be, it shall be deemed for terme of the life of the lessee, for it shall be taken most strongly against the lessor, and as hath beene said an estate for a man's own life is higher than for the life of another (11). But if tenant in taile make such a lease without expressing for whose life, this shall be taken but for the life of the lessor, for two reasons.

First, when the construction of any act is left to the law, the law which abhorreth injury and wrong will never so construe it, as it shall work a wrong: and in this case, if by construction it should be for the life of the lessee, then should the estate taile be discontinued, and a new reversion gained by wrong: but if it be construed for the life of the tenant in taile, then no wrong is wrought. And it is a generall rule, that whensoever the words of a deed, or of the [42. b.] parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongfull and against law, the intendment that standeth with law shall be taken.

(Post. 183.)

4 E. 2. West. 4.  
17 E. 3. 7.  
(Mo. 258. 381.  
Post. 270. 2.)

Secondly, The law more respecteth a lessor estate by right, than a larger estate by wrong; as if tenant for life in remainder disseise tenant for life, now he hath a fee simple; but if tenant for life die; now is his wrongfull estate in fee by judgment in law changed to a rightfull estate for life.

If a man retain a servant generally without expressing any time, the law shall construe it to be for one yeare, for that retainer is according to law. *Vid.* 23 E. 3. cap. 1, &c. (1). To shut up this point it hath been adjudged, that where tenant in taile made a lease to another for terme of life generally, and after released to the lessee and his heires, albeit betweene the tenant in taile and him a fee simple passed, yet after the death of the lessee the entry of the issue in taile was lawfull; which could not be, if it had been a lease for the life of the lessee, for then by the release it had been a discontinuance executed (2). But let us now returne to *Littleton*.

10 H. 6.  
7 H. 4. 62.  
5 E. 3. 17.  
7 E. 3. 66.  
18 E. 3. 60.  
23 E. 3. c. 1, &c.  
11 H. 4. 44.  
39 E. 3. 23, 24.

## Sect. 57.

**E**T est ascavoir, que il y ad le feoffor et le feoffee, donor et le donee, le lessor et le lessee. Le feoffor est properment lou home enfeoffu un auter en ascuns terres ou tenements en fee simple, celui que fist le feoffment est appel feoffour et celui a que le feoffment est fait est appel feoffee. Et le donour est properment lou un home done certaine terres ou tenements a un auter en le taile, celui que fist le done est appel le donour, et celui a que le done est fait est appel le donee. Et le lessor est properment lou un home lessu a un auter certaine terres ou tenements pur terme de vie, ou per terme des ans; ou a tener a volunt,

**A**ND it is to be understood, that there is feoffor and feoffee, donor and donee, lessor and lessee. Feoffor is properly where a man enfeoffes another in any lands or tenements in fee simple, he which maketh the feoffment is called the feoffor, and he to whom the feoffment is made is called the feoffee. And the donor is properly where a man giveth certaine lands or tenements to another in taile, he which maketh the gift is called the donour, and he to whom the gift is made is called the donee. And the lessor is properly where a man letteth to another lands or tenements for terme of

(11) [See Note 246.]

(1) [See Note 247.]

(2) [See Note 248.]

*volunt, celui que fist le leas est appel lessor, et celui a que le leas est fait est appel lessee. Et chescun que ad estate en ascun terres ou tenements pur terme de sa vie ou per terme d'auter vie, est appell tenant de franktenement, et nul auter de meindre estate poit aver franktenement: mes ceux de greinder estate ont franktenement; car cestuy en fee simple ad franktenement, et celui en le taile ad franktenement, &c.*

of life, or for terme of years, or to hold at will, he which maketh the lease is called lessor, and he to whom the lease is made is called lessee. And every one which hath an estate in any lands or tenements for term of his owne or another man's life, is called tenant of freehold, and none other of a lesser estate can have a freehold: but they of a greater estate have a freehold; for he in fee simple hath a freehold, and tenant in taile hath a freehold, &c.

**T**HIS and the rest that follow in this Chapter concerning the description of the feoffor and feoffee, donor and donee, and lessor and lessee, are evident.

*"Et est ascavoir que il y ad le feoffor et le feoffee, &c."* Vide Sect. 2. where a light touch is given who may purchase. Now somewhat is to be said, who have ability to enfeoffe, &c. and may be a feoffor, donor, lessor, &c. Whosoever is disabled by the common law to take, is disabled to infeoffe, &c. But many that have capacite to take, have no abilitie to infeoffe, &c. as men attainted of treason, felony, or of a *præmunire*, aliens borne, the king's villains, traitors, felons, &c. he that hath offended against the statutes of *præmunire*, after the offences committed (3) if attainders ensue, ideots, madmen, a man deafe dumbe and blinde from his nativity, a feme covert, an infant, (4) a man by dures; for the feoffments, &c. of these may be avoyded. But an hereticke, though he be convicted of heresie, a leper removed by the king's writ from the society of men, bastards, a man deafe dumbe or blinde, so that he hath understanding and sound memory, albeit he expresse his intention by signes, villaine of a common person before entrie, or the like [43. a.] may infeoffe, &c.

[a] All feoffments, gifts, grants, and leases by bishops, albeit they be confirmed by the deane and chapter, by any of the colledges or halls in either of the Universities, or elsewhere, deans and chapters, master or gardian of any hospital, parson, vicar, or any other having spirituall or ecclesiastical living, are also to be avoyded; (b) and all the said bodies politique or corporate are by the statutes of the realm disabled to make any conveiances to the king, or to any other, as it hath been adjudged: which statutes have bin made since *Littleton* wrote (1).

It is provided [c] by the statute of *Magna Charta*, *quòd nullus liber homo det de cetero amplius alicui de terrâ suâ quàm ut de residuo terræ suæ possit sufficient' fieri domino feodi servitium ei debitum quod pertinet ad*

Bracton. lib. 5. fo. 415.  
Britton. fo. 88.  
Fleta. lib. 3. ca. 3. & lib. 6. ca. 39, 40.

2 H. 5. ca. 7.  
which is repeated.  
Doct. and Stud.  
lib. 2. ca. 39.

[a] 39 H. 6. cap. 22.  
1 El. not printed.  
13 El. ca. 10.  
14 El. ca. 11.  
16 El. ca. 20.  
1 Ja. cap. 3.  
[b] 4. Co. 76.  
130. s. Co. 6. 14.  
6. Co. 37.  
11. Co. 67.  
Magdalen Colledge case.  
Vide Lect. de W. 2. ca. 41.  
[c] *Magna Charta*, cap. 32.  
Mirror, cap. 8.  
sect. 2.  
Glauvil. lib. 7. ca. 1.  
Bract. lib. 1.  
Brit. 88. &c.

Fleta, lib. 3. cap. 3.

(3) As to conveyances made by felons or by offenders against the statutes of *præmunire* between indictment and attainder, see W. Jo. 217. Cro. Cha. 172. and Wils. vol. 1. part 2. page 219.

(4) [See Note 249.]

[43. a.]

(1) [See Note 250.]

*ad feudum illud.* Upon which act I have heard great question [d] made, whether the feoffments made against that statute were voydable or no; and some have said that the statute intended not to avoyd the feoffment, but implicate to direct the tenure, viz, that the tenant should not infeoffe another of parcell to hold of the chief lord (that is of the next lord) but to hold of himselfe, and then the lord may distreine in everie part for his whole service without any prejudice unto him. But this opinion is against [e] the authoritie of our bookes, and against the said statute of *Magna Charta*. For first it is agreed in 10 H. 7. that as well before the statute as after, a tenant which held two acres might have aliened one of the acres to hold of him, and notwithstanding the lord might have distrained in which of the acres he would for his whole services: and reason teacheth that before that statute a tenant could not have aliened parcell to hold of the chief lord; for the seignory of the lord was entire, for the which the lord might distreine in the whole or in any part, and which the tenant by his owne act cannot divide to the prejudice of the lord to barre him to distreine in any part, for his services, as he should doe, if he should infeoffe another of parcell to hold of the chief lord. But the tenant might have made a feoffment of the whole to hold of the chief lord, for there no prejudice ensued to the lord (2). Others have said, and they said truly, that the intention of the statute was, that the tenant could not alien parcell (which might turn to the prejudice of the lord) without his assent, and this appeareth cleerly by the *Mirror*. And by this statute the king tooke benefit to have a fine for his licence, before which statute no fine for alienation was due to the king. For it is [f] adjudged that for an alienation in time of *Henry* the second, no fine was due; and it appeareth in our bookes, that if an alienation had bene made before 20 H. 3. no fine was due to the king for alienation (3). Now it is to be observed, that oftentimes for the better understanding of our bookes, the advised reader must take light from historie and chronicles, especially for distinction of times. And therefore *Matthew Paris* (who in his Chronicle reciteth *Magna Charta*) (4) testifieth that king *Henry* the third by evill counsell (and especially, as the truth was, of *Hubert de Burgo* then chief justice) sought to avoyde the Great Charter first granted by his father king *John*, and afterward granted and confirmed by himselfe in the ninth of *Henry* the third, for that as he the said king *John* did grant it by duress, and that he himselfe was within age when he granted and confirmed it. But forasmuch as afterwards the said king *Henry* the third in the twentieth yeare of his raigne, at what time he was nine and twentie yeare old, did grant and confirme the said Great Charter; for that cause, to put out all scruples, is the twentieth yeare of *Henry* the third named, albeit in law the king's charter granted in the ninth yeare of *Henry* the third was of force and validitie, notwithstanding his nonage, for that in judgement of law the king, as king, cannot be said to be a minor; for when the royall bodie politique of the whole bodie shall have the qualitie of the royal politique, which is the greater and more worthy, and wherein is no minoritie (1).

For,

[43. b.]

(2) [See Note 251.]

(3) [See Note 252.]

(4) [See Note 253.]

(1) See this subject considered at large in the case of the dutchy of Lancaster Plowd. 214, and in *Willion* and *Berkley* Plowd. 234.

[d] Vide an excellent declaration hereof inter adjudicat' coram Rege, Trin. E. 1. fo. 2. in Thesaur. Not. & Derb.

[e] Bract. lib. 1. 10 H. 7. fol. 10. b. 31 E. 3. Avowry 255. Stamf. prag. 10. 29. 9 E. 4. f. 2.

*Mirror*, cap. 6. sect. 2. Fleta, lib. 3. cap. 3. [f] 20. Ass. p. 37. 20. Ass. p. 17. 20 E. 3. Avowry 125. 34 E. 3. c. 15. Vide Stamf. 29. 30. Matt. Paris. Walsingham 37. 39. Vide 5 H. 3. Mordaunc. 53. *Magna Charta* there vouched, which was the charter of King *John*, for it was cited before 9 H. 3.

20. Ass. pl. 17. by Shipwigh.

For, *omne majus trahit ad se quod est minus*. And it is to be observed, that no record can be found, that either a licence of alienation was sued, or pardon for alienation was obtained for an alienation without licence at any time before the twentieth year of Henry the third, and it is holden in the twentieth of Edward the third, that a licence for alienation grew by this statute.

Now in the case of a common person it was the common opinion, that if the tenant had aliened any parcell contrary to the said act, that he himselfe was bound by his owne act, but that his heire might have avoyded it; and in the king's case many held the same opinion. For Britton saith, *ne counts, ne barons, ne chivaler, ne serjeants, que teignent en chiefe de nous ne furr' my dismember n'au feca auns licence: que nous ne puissent per droit engettre les purchasors, &c.* And herewith agreeth *Fleta*, and our bookes. But now by the statute 1 E. 3. cap. 12. & 34 E. 3. cap. 15. although the king's tenant in chiefe or by grand serjantie do alien all or any part without licence, yet is there not any forfeiture of the same, but a reasonable fine therefore to be paid. And note, it appeareth by the preamble in 1 E. 3. that complaint was made that land holden of the king in capite, being aliened without licence, was seized as forfeited. And in the case of a common person, the statute of 18 E. 1. *De quia emptores terrarum* hath made it cleare, for this hath in effect as to the common persons taken away the said statute of *Magna Charta* cap. 32. for thereby it is provided, *quod liceat unicuique libero homini terras suas seu tenementa sua, seu partem inde ad voluntatem suam vendere, ita quod feoffatus teneat, &c. de capitali domino*. And herein are divers notable points to be observed. First, that this word *liceat* proveth that the tenant could not, or at least wayes was in danger to alien parcell of his tenancy, &c. upon the said act of *Magna Charta*. Secondly, that upon the feoffment of the whole, the tenant shall hold of the chiefe lord. Thirdly, that the tenant might enfeoffe one of part to hold *pro perticula* of the chiefe lord. But this act (the king being not named) doth not take away the king's fine due to him by the statute of *Magna Charta* (2).

(Howd. 501. b. 562.)  
Bracton, lib. 4. fo. 224.  
Brit. cap. 32. & 47.  
Bracton, lib. 4. fo. 32.  
Regist. Judic. 68. 73.  
28. Ass. p. 7.  
W. 2. ca. 12.  
Stat. de mercatoribus an.  
13 E. 1.  
27 E. 3. ca. 9.  
23 H. 8. ca. 6.  
F. N. B. 178.  
(Auto 42. a.)

"*Franktenement*." Here it appeareth that tenant in fee, tenant in taile, and tenant for life, are said to have a franktenement, a freehold, so called, because it doth distinguish it from termes of yeares, chattels upon uncertaine interests, lands in villenage or customary, or copyhold lands. *Liberum autem tenementum dicitur ad differentiam villenagii, et villanorum qui tenent villenagium, qui non habent actionem ne quisam, &c. item quod sit suum et non alienum, hoc est, ei teneat nomine alieno ut firmarius et ad terminum vel sicut creditor ad vadium*. And note that tenant by statute merchant, statute staple, or *elegit*, are said to hold land *ut liberum tenementum* untill their debt be paid, and yet in troth they (as hath beene said) have no freehold, but a chattle, which shall go to the executors, and the executors also if they be ousted shall have an assise. But (*ut*) is similitudinary, because they shall by the statutes have an assise as tenant of the freehold shall have, and to that respect hath a similitude of a freehold, but *nullum simile est idem*.

(2) [See Note 254.]

## CHAP. 7.

## Tenant for terme of yeares.

## Sect. 58.

**T**ENANT pur terme d'ans est, lou home lessa terres ou tenements a un auter pur terme de certaine ans, solonque le number des ans que est accord perenter le lessor et le lessee. Et quant le lessee entrer per force del leas, donque il est tenant pur terme des ans ; et si le lessor en tiel case reserve a luy un annuall rent sur tiel leas, il poit eslier a distraîner pur le rent en les tenements lesses, ou il poit atter un action de debt pur les arrerages enverz le lessee. Mes en tiel case il covient, que le lessor soit seisie de mesmes les tenements al temps del leas ; car il est bone plee pur le lessee a dire, que le lessor n'avoit riens en les tenements al temps de le leas, sinon que le leas soit fait per fait endent, en quel case tiel plee donque ne gist en le bouch le lessee a pleader.

**T**ENANT for terme of yeares is where a man letteth lands or tenements to another for terme of certaine yeares, after the number of yeares that is accorded between the lessor and the lessee. And when the lessee entreth by force of the lease, then is he tenant for terme of yeares ; and if the lessor in such case reserve to him a yearely rent upon such lease, he may chuse for to distraine for the rent in the tenements letten, or else he may have an action of debt for the arrerages against the lessee. But in such case it behooveth, that the lessor be seised in the same tenements at the time of his lease ; for it is a good plee for the lessee to say, that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, in which case such plee lieth not for the lessee to plead.

“**L**OU home lessa terres, &c.” Lessa and lease is [a] derived of the Saxon word *leafum*, or *leasum*, for that the lessee cometh in by lawfull meanes ; [b] and *dimittere* is in French *luysser*. to depart with or forgoe.

When *Littleton* wrote, many persons might make leases for [44. a.] yeares, or for life, or lives at their will and pleasure, which now cannot make them firme in law. And some persons may now make leases for yeares, or for life or lives (observing due incidents), firme and good in law, who of themselves could not so doe when *Littleton* wrote, and this by force of divers acts of parliament [c] ; as namely 32 H. 8. 1 Eliz. 13 Eliz. 18 Eliz. and 1 Jac. Regis, of which statutes one is enabling, and the rest are disabling. When *Littleton* wrote, bishoppes with the confirmation of the deane and chapter, master and fellowes of any colledge, deanes and chapters, master or gardian of any hospitall, and his brethren, parson or vicar with the consent of the patrone and ordinary, archdeacon, prebend, or any other body politique spirituall and ecclesiasticall (*concurrentibus hiis quæ in jure requiruntur*) might have made leases for lives or yeares without limitation or stint. And so might they have made gifts in taile or states in fee at their will and pleasure, whereupon not onely great decay of divine service, but dilapidations, and other inconveniences ensued, and therefore they were disabled and restrained by the sayd acts of 1 Eliz. 13 Eliz. and 3 Jac. Regis to make any state or conveyance to the king at all, or to the subject ; but there is excepted out of the restraint or disability, leases for three lives, or one and twenty yeares, with such reservation

[a] Mirror, cap. 2. sect. 17. Bracton, lib. 2. cap. 26. & lib. 4. fol. 230. Fleta, lib. 3. cap. 12. & lib. 5. cap. 34. [b] For the word (*dimitto*) see Sect. 531.

[c] 32 H. 8. ca. 28. 1 Eliz. not printed but in the abridgement. 13 Eliz. cap. 10. 18 Eliz. cap. 6. 1 Jac. cap. 3.

5. Co. 14. case de ecclesiastical persons. 11. Co. 66. Magdalen Colledge case, Levesque de Sarum's case. 10 Co. 60. 61. (1. Sid. 162.) (5 Co. 18.)

(Cro. Cha. 16.  
47. 60.  
10 Co. 58.  
Pollexf. 134.  
4 Mod. 16.  
Finch 191, 192,  
193.  
Cro. Cha. 48.  
Cro. Jac. 173.)

servation of rent, and with such other provisions and limitations, as hereafter shall appeare. Also, they may make grants of ancient offices of necessity with ancient fees, *concurrentibus his que in jure requiruntur*, for those grants are not within the statute of 32 H. 8. but by construction, they are not restrained by the statutes of 1 Eliz. or 13 Eliz. because these ancient offices be of necessity, and with the ancient fees, and so no diminution of revenue (1).

There be three kinds of persons that at this day may make leases for three lives, &c. in such sort as is hereafter expressed, which could not so doe when *Littleton* wrote, viz. First, any person seised of an estate taile in his owne right. Secondly, any person seised of an estate in fee simple in the right of his church. Thirdly, any husband and wife seised of any estate of inheritance in fee simple or fee taile in the right of his wife, or jointly with his wife before the coverture or after, viz. the tenant in taile, by deed to binde his issues in taile, but not the reversion or remainder, the bishop, &c. by deed without the deane and chapter to bind his successors, the husband and wife by deed to bind the wife and her and their heires (2), and these are made good by the statute of 32 H. 8. which inableth them thereunto. But to the making good of such leases by the said statute, there are nine things necessarily to be observed belonging to them all, and some other to some of them in particular.

1 Co. 6. Seig.  
Mountjoye's case.  
(3 Lev. 458.  
Cro. Ja. 94. 458.)

First, the lease must be made by deed indented, and not by deed poll, or by paroll (3).

Secondly, it must be made to begin from the day of the making thereof or from the making thereof (4).

1 Co. 2.  
Bumer's case.

Thirdly, if there be an old lease in being, it must be surrendered (1) or expired, or ended within a yeare of the making of the lease, and the surrender must be absolute and not conditionall. [44, b.]

Fourthly, there must not be a double lease in being at one time; as if a lease for yeares be made according to the statute, he in the reversion cannot expulse the lessee, and make a lease for life or lives according to the statutes, nor *à converso*; for the words of the statute be, to make a lease for three lives, or one and twenty yeares, so as one or the other may be made, and not both (2).

(Cro. Cha. 95.  
Cro. Ja. 128.  
173.)

Fifthly, it must not exceed three lives, or one and twenty yeares, from the making of it, but it may be for a lesser terme or fewer lives.

[d] 5. Co. 3.  
Jewel's case.  
17 E. 3. 75.  
9. Ans. 24.  
24 E. 3. Seigre  
Rains 22.  
10 H. 6. 2.  
3 H. 6. 21.  
(1. Sid. 316,  
317. 416. Cro.  
Eliz. 708.

Sixthly, it must be of lands, tenements, or hereditaments, manurable or corporeall, which are necessary to be letten, and whereout a rent by law may be reserved, and not [d] of things that lye in grant, as advowsons, fairens, markets, franchises, and the like, whereout a rent cannot be reserved (3).

Seventhly, it must be of lands or tenements, which have most commonly beene letten to farme, or occupied by the farmers thereof by the space of 20 yeares next before the lease made, so as if it be letten

(1) [See Note 255.]

(2) [See Note 256.]

(3) See New Abr. *Leases*, E. 2.

(4) [See Note 257.]

(1) [See Note 258.]

(2) M. 29. 30 Eliz. *Clench* 138. *Grindal's case*. Hal. MSS.—See S. C. 4. Leon. 78. 1. and 65. and Mo. 107. and the observations upon it in New Abr. *Leases*, E. rule 3.

(3) [See Note 259.]



letten for 11 yeares at one or severall times within those 20 yeares it is sufficient. A grant [e] by copy of court roll in fee for life or yeares is a sufficient letting to farme within this statute, for he is but tenant at will according to the custome, and so it is of a lease at will by the common law; but those lettings to farme must be made by some seised of an estate of inheritance, and not by a gardian in chivalry; tenant by the curtesie, tenant in dower, or the like (4).

Eightly, that upon every such lease there be reserved yearly during the same lease due and payable to the lessors, their heires and successors, &c. so much yearly farme or rent, or more, as hath beene most accustomedly yielded or paid for the lands, &c. within twenty yeares next before such lease made (5). Hereby first it appeareth (as hath beene said) that nothing can be demised by authority of this act, but that whereout a rent may be lawfully reserved. Secondly, that where not onely a yearly rent was formerly reserved, but things not annuall, as heriots, or any fine or other profit at or upon the death of the farmor, yet if the yearly rent be reserved upon a lease made by force of this statute, it sufficeth by the expresse words of the act. Thirdly, if he reserve more than the accustomed rent, it is good also by the expresse letter of the act; but if twenty acres of land have beene accustomedly letten, and a lease is made of those twenty, and of one acre which was not accustomedly letten, reserving the accustomedly yearly rent, and so much more as exceeds the value of the other acre, this lease is not warranted by the act, for that the accustomed rent is not reserved, seeing part was not accustomedly letten, and the rent issueth out of the whole. Fourthly, if tenant in taile let part of the land accustomedly letten, and reserve a rent *pro rata*, or more, this is good, for that is in substance the accustomed rent. Fifthly, if two coparceners be tenants in taile of twenty acres every one of equall value, and accustomedly letten, and they make partition, so as each have ten acres, they may make leases of their severall parts each of them, reserving the halfe of the accustomed rent. Sixthly, if the accustomed rent had beene payable at four daies or feasts of the yeare, yet if it be reserved yearly payable at one feast, it is sufficient, for the words of the statute be, reserved yearly.

Ninthly, nor to any lease to be made without impeachment of wast. Therefore if a lease be made for life, the remainder for life, &c. this is not warranted by the statute, because it is dispunishable of waste. But if a lease be made to one during three lives, this is good, for the occupant, if any happen, shall be punished for waste (6). The words of the statute be (seised in the right of his church), yet a bishop that is seised *jure episcopatus*, a deane of his sole possessions in *jure decanatus*, an archdeacon in *jure archidiaconatus*, a prebendary and the like are within the statute, for every of them generally is seised in *jure ecclesie* (7).

But a parson and vicar are excepted out of the statute of 32 H. 8. and therefore, if either of them make a lease for three lives, &c. of lands accustomedly letten, reserving the accustomed rent, it must be also confirmed by the patron and ordinary, because it is excepted out of 32 H. (8), and not restrained by the statutes of *primo* or 13 Eli.

[e] 6. Co. 37.  
Deane and Chapter of Worcester's case.

5. Co. 6.  
Seignior Mountjoye's case.

(Cro. Jam. 76.)

6. Co. 37, 38.  
Deane and Chapter of Worcester's case.

5. Co. 5.  
Seignior Mountjoye's case.  
6. Co. 37.

Lord Mountjoye's case ubi supra.

(Cro. Cha. 16. 17.)

Deane and Chapter of Worcester's case ubi supra.

Deane and Chapter of Worcester's case ubi supra.

3 E. 6. 1 Mantit.  
Leases.  
Brood.  
(Finch 191.)

(4) [See Note 260.]

(5) 6. Rep. 37. T. 3. Jac. Crook n. 6.  
Hal. MSS. See Cro. Jam. 76.

(6) [See Note 261.]

(7) [See Note 262.]

(8) [See Note 263.]

13 *Eliz.* And what hath beene said concerning a lease for three lives, doth hold for a lease for one and twenty yeares.

Thus much shall suffice to have spoken of the inabling statute of 32 *H. 8.* the better to inable the reader to understand both this and that which followes. Now to speake somewhat of the disabling statutes of 1 *Eliz.* and 13 *Eliz.* (9), the words of the exception out of the restraint and disability of 1 *Eliz.* are, *other than for the terme of twenty one yeares, or three lives, from such time as any such grant or assurance shall be given, whereupon the old and accustomed yearly rent, or more, shall be reserved*: and to that effect is the exception in the statute of 13 *Eliz.* First, it is to be understood that neither of these disabling acts, nor any other, do in any sort alter or change the inabling statute of 32 *H. 8.* but leaveth it for a pattern in many things for leases to be made by others. Secondly, it is to be knowne, that no lease made according to the exception of 1 *Eliz.* or 13 *Eliz.* and not warranted by the statute of 32 *H. 8.* if it be made by [45. a.] a bishop, or any sole corporation, but it must be confirmed by the deanes and chapters, or others that have interest, as hath been said in the case of the parson and vicar, but examples doe illustrate. If a bishop make a lease for 21 yeares, and all those yeares being spent saving three or more, yet may the bishop make a new lease to another for twenty one yeares, to begin from the making, according to the exception of the statute, but not a lease for life or lives, as hath beene said; and this concurrent lease hath been resolved to be good (1), as well upon the exception of 1 *Eliz.* in the case of bishops, as upon 13 *Eliz.* (2) which extend to spirituall and ecclesiasticall corporations, aggregate of many, as deanes and chapters, &c. which 32 *H. 8.* did not: but in the case of the concurrent lease, in the case of the bishop it must be confirmed. Also the exception of 1 *Eliz.* and 13 *Eliz.* doth differ from the statute of 32 *H. 8.* for the leases for yeares to be made according to the exceptions of the statutes of 1 and 13 *Eliz.* must begin from the making, and not from the day of the making, but by force of 32 *H. 8.* from the day of the making. And although the statutes of the first or thirtieth of *Eliz.* doe not appoint the lease to be made by writing, yet must it therein and in the other eight properties or qualities before mentioned and required by 32 *H. 8.* follow the patterne thereof (the concurrent lease only except). (3) Although the exception in 1 and 13 *Eliz.* concerning the accustomed rent is more generall then that of 32 *H. 8.* and there is not any provision for leases made punishable of waste, &c. yet must the patterne of 32 *H. 8.* be followed; for leases without impeachment of waste made by such spirituall and ecclesiasticall persons are unreasonable and causes of dilapidations. Thus much have I thought good to lead the studious reader by the hand, and to conduct him in the right way, and to put all these things together upon consideration had of all the statutes, which otherwise might have *prima facie* seemed to him a diffuse and darke

(9) [See Note 264.]

[45. a.]

(1) Accordingly adjudged, though the concurring lease was to commence a *datu indenturæ*. T. 21 *Eliz.* Rot. 124. *Fox and Collier*. M. 22. 23 *Eliz.* C. B. Rot. 2409. *Scot and Brewster*. H. 22 *Jac.* B. R. Rot.

11. *Evans and Ascu* adjudged. T. 3 *Car.* P. 33 *Eliz.* W. 14. *Southcot's case*. Hal. MSS.

(2) [See Note 265.]

(3) H. 44 *Eliz.* C. B. n. 14. D. D. *Bishop of Hereford against Scory*. Adjudged accordingly, where the land had not been usually demised. Hal. MSS.

darke labyrinth. And albeit it be provided by the said acts of 1 and 13 *Eliz.* that all grants, &c. leases, &c. made, &c. (other than leases for three lives, or one and twenty yeares according to those acts) should be utterly voyd and of none effect, to all intents, constructions, and purposes, yet grants, or leases, &c. not warranted by those acts are not voyd, but good against the lessor, if it be a sole corporation: or so long as the deane or other head of the corporation remaine, if it be a corporation aggregate of many (4): for the statute was made in benefit of the successor (5). But let us now returne to our author.

“*Home lease.*” Here *Littleton* putteth this case where one letteth, &c. It is therefore necessary to be seen what the law is where divers joyne in a lease. If the tenant of the land and a stranger which hath nothing in the land joyne in a lease for yeares by deed indented of one and the self-same land, this is the lease of the tenant onely, and the confirmation of the stranger, and yet the lease as to the stranger workes by conclusion (6).

If two severall tenants of severall lands joyne in a lease for yeares by deed indented, these be severall leases, and severall confirmations of each of them, from whom no interest passeth, and worke not by way of conclusion in any sort, because severall interests passe from them (7). *B.* tenant for life of *C.* and he in the remainder or reversion in fee, having severall estates in the one and the same land, joyne in a lease for yeares by deed indented, this demise shall worke in this sort: during the life of *C.* it is the lease of *B.* and confirmation of him in the reversion or remainder, and after the decease of *C.* it is the lease of him in the reversion or remainder, and the confirmation of *B.*; for seeing the lessors have severall estates, the law shall construe the lease to move out of both their estates respectively, and every one to let that which he lawfully may let, and not to be the lease onely of tenant for life, and the confirmation of him in the remainder or reversion, neither is there any conclusion in this case, as shall be said hereafter. Tenant for life and he in the remainder in fee made a lease for yeares by deed indented, the lessee was ejected, and brought an *ejectione firme*, and declared upon a demise made by tenant for life and him in remainder, and upon not guilty pleaded, this speciall matter was found, and that tenant for life was living, and it was adjudged [*a*] against the pl<sup>r</sup>, for during the life of the tenant (as hath been said) it is the lease of the tenant for life, and therefore during his life he ought to have declared of a lease made by him, and after his decease he ought to declare of a lease made by him in remainder (8). [*b*] And the deed indented could be no estoppel in this case, because there passed an interest from them both. And whensoever any interest passeth from the party, there can be no estoppel against him, and [*c*] so it was adjudged. Hereby you shall understand your bookes the better which treat of those matters,

3. Co. 59. 60.  
Lincolne Colledge  
case, p. 39.  
*Eliz.* inter Hunt  
and Singleton ibi-  
dem.

(2. Ro. Abr. 84.)  
Vide Sect. 340.  
11 H. 4. 1.  
5 H. 4. 4. a.  
37 H. 8. 10.

(1. Ro. Abr.  
877. Mo. 72.  
1. Leon. 177.  
Cro. El. 701.  
6. Co. 75.  
Trepour's case.  
Doe. Pl. 93.)

[a] 37 H. 8.  
f. 13. a.  
13 H. 7. 14.  
2. H. 8. 7.  
1. Co. 76.  
Bredon's case.  
(Post. 302. b.)  
[b] Mich. 36.  
&c. 37 *Eliz.* in the  
King's Bench. Vide  
Mich. 6. & 7 *Eliz.*  
Dyer 234. 236.  
[c] Hill. 44 *Eliz.*  
Hoc 1660. in Com-  
muni Banco inter  
Ellice & Cowne.

(4) [See Note 266.]

(5) See further as to leases by tenants in tail, husband and wife, and ecclesiastical persons, in Vin. Abr. tit. *Estates* and tit. *Confirmation*, and New Abr. tit. *Leases*; which title in the latter book is generally attributed to lord chief baron Gilbert, and comprises a

most copious and excellent treatise on a very difficult and extensive subject.

(6) 2 H. 5. 7. by Asht. Hal. MSS.

(7) [See Note 267.]

(8) Intratur H. 34 *Eliz.* Rot. 72. *King and Beny.*—Hal. MSS.

ters, and accordingly it was adjudged that where tenant in taile and he in the remainder in fee joyned in a grant of a rent charge by deed in fee, and after tenant in taile died without issue, the grantee distrained and avowed by force of a graunt from him in the remainder, and upon *non concessit*, the jury found the speciall matter, and it was adjudged for the avowant; for every one granted according to his estate and interest.

Leases for lives or yeares are of three natures; some be good in law; some be voydable by entry, and some voyd without entry. Of such as be good in law, some be good at the common law as made by tenant in fee, whereof *Littleton* here putteth his case: some by act of parliament; as tenant in taile, a bishop seised in fee in the right of his church alone without his chapter, a man seised in fee simple or fee taile in the right of his wife together with his wife (as hath beene said) may by deed indented make leases for 21 yeares or three lives in such manner and forme as hath been said and by the statute [d] is limited, all which were voydable by the common law when *Littleton* wrote, and now are made good by parliament. [45. b.]

(G. Co. 64. b.)

[59] 32 H. 8.  
cap. 23.

(Flow. 264. b.  
Cro. J. 173.)

An infant seised of land holden in socage, may by custome make a lease at his age of 15 yeares, and shall binde him, which lease was voydable by the common law; (1) voydable, some by the common law, after the death of the lessor, as of tenant in taile, a bishop, &c. or after the death of the husband (intended of leases not warranted by the said statute of 32 H. 8.); some voydable by act of parliament, as by a bishop though it be confirmed by deane and chapter, if it be not warranted by the statute of 32 H. 8. and so of a deane and chapter after the death of the deane; some voydable at times by the lessor himselfe or his heires, as by an infant and the like. Some voyde *in futuro*, and some voyde *in presenti*. *In futuro*, as if a tenant in taile make a lease for yeares and die without issue, it is voyde, as to them in reversion or remainder, though it be made [e] according to the said statute. If a prebend, parson or vicar make a lease for yeares, it is voyde by death, if it be not according to the statutes. Otherwise it is of a lease for life, for that is voidable, *et sic de similibus*.

[e] 33 H. 8.  
Dier. 3. Co. 89, 60.  
in Lincoln Col-  
ledge case.  
Munt's case vouch-  
ed.  
(1 Ro. Abr. 848.)

Some voyde *in presenti*; as if one make a lease for so many yeares as he shall live, this is voyde *in presenti* for the incertainty. *Et sic in similibus*, whereof *Littleton* himselfe will teach you next and immediately, and I know you would now gladly heare him.

Pl. Com.  
Wrotel. 198.  
33 H. 8. tit.  
exposition des  
parols. 44.  
5. Co. 145. In De-  
vampert's case.  
(5. Co. 7.  
1. Co. 154. 274.  
1 Ro. Abr. 849.)

"*Pur terme*," *Pro termino*. *Terminus* in the understanding of the law doth not onely signifie the limits and limitation of time, but also the estate and interest that passeth for that time. As if a man make a lease for twenty one yeares, and after make a lease to begin *à fine et expiratione predicti termini 21 annorum dimissa*, and after the first lease is surrendered, yet the second lease shall begin presently; but if it had beene to begin *post finem et expirationem predicti 21 annorum*; in that case although the first terme had been surrendered, yet the second lease should not begin till after the 21 yeares be ended by effluxion of time; and so note the diversitie betwene the terme for 21 yeares, and 21 yeares; and [f] herewith agreeth the lord *Pagel's* case.

[f] 1. Co. 154.  
in the Rector of  
Chedington's  
case.  
[g] Vide Sect. 531.

[g] Words to make a lease be, demise, grant, to fearme let, be- take; and whatsoever word amounteth to a grant may serve to make a lease

(1) [See Note 258.]

a lease. In the king's case [*h*] this word *Committo* doth amount sometime to a grant, as when he saith *Commisimus W. de B. officium seneschalsie, &c. quamdiu nobis placuerit*, and by that word also he may make a lease: and [*i*] therefore *à fortiori* a common person by that word may doe the same.

[*A*] Register  
F. N. B. 270. c.

[*J*] 6 H. 6. 34.]

[*K*] 14 H. 8. 14.  
3. Mar. leaves  
Br. 67. 3 Mar.  
ibid. 67. Say and  
Fuller's case, Pl.  
Com. 273. and  
Welden's case,  
ibid.  
4 H. 6. 12.  
21 H. 7. 38.  
Vid. le case del  
evesque de Bathes  
6. Co. 34. 35.  
Bract. lib. 2.  
cap. 9. Vid. 1.  
Co. 155, 156.  
Rector de Ched-  
ington's case-  
(1. Ro. Abr.  
243, 246.)  
Bract. lib. 2.  
cap. 9. So resolv-  
ed Hill. 26 Ria.  
Rot. 935. in com.  
hancoc.

Pl. Com. Say and  
Fuller's case. Min-  
or, ca. 2. sect. 17.  
& cap. 5.  
sect. 1.

"*De certaine ans.*" For regularly in every lease for yeares the terme must have a certaine beginning and a certaine end; and here- with [*k*] agreeth *Bracton*, *terminus annorum certus debet esse et determinatus*. And *Littleton* is here to be understood, first, that the yeares must be certaine when the lease is to take effect in interest or possession. For before it takes effect in possession or interest, it may depend upon an uncertainty, viz. upon a possible contingent before it begin in possession or interest, or upon a limitation or condition subsequent. Secondly, albeit there appeare no certainty of yeares in the lease, yet if by reference to a certainty it may be made certaine it sufficeth, *Quia id certum est quod certum reddi potest*. For example of the first. If *A.* scised of lands in fee grant to *B.* that when *B.* payes to *A.* xx. shillings, that from thenceforth he shall have and occupie the land for 21 yeares, and after *B.* pays the xx. shillings, this is a good lease for 21 yeares from thenceforth. For the second, if *A.* leaseth his land to *B.* for so many yeares as *B.* hath in the mannor of *Dale*, and *B.* hath then a terme in the mannor of *Dale* for 10 yeares, this is a good lease by *A.* to *B.* of the land of *A.* for 10 yeares. If the parson of *D.* make a lease of his glebe for so many yeares as he shall be parson there, this cannot be made certaine by any meanes, for nothing is more uncertaine then the time of death, *Terminus vite est incertus, et licet nihil certius sit morte, nihil tamen incertius est hora mortis* (2). But if he make a lease for three yeares, and so from three yeares to three yeares, so long as he shall be parson, this is a good lease for 6 yeares, if he continue parson so long, first for three yeares, and after that for three yeares; and for the residue uncertaine (3).

If a man maketh a lease to *I. S.* for so many yeares as *I. N.* shall name, this at the beginning is uncertaine; but when *I. N.* hath named the yeares, then it is a good lease for so many yeares.

A man maketh a lease for 21 yeares if *I. S.* live so long; this is a good lease for yeares, and yet is certaine in uncertainty, for the life of *I. S.* is uncertaine. See many excellent cases concerning this matter put in the said case of the bishop of *Bath* and *Wells*. By the ancient law of *England* for many respects a man could not have

[46. a.] made a lease above 40 yeares at the most, for then it was said that by long leases many were prejudiced, and many times men disherited, but that ancient law is antiquated (1).

In the eye of the law any estate for life being, as *Littleton* hath said, an estate of freehold, against whom a *præcipe quod reddat* doth lye, is an higher and greater estate than a lease for yeares, though it be for a thousand or more, which never are without suspicion of fraud; and they were the lesse valuable, for that at the common law they were subject unto, and under the power of the tenant of the freehold, the learning whereof standeth thus, and is worthy to be knowne. When *Littleton* wrote, if a man had made a lease for yeares by writing, and he that had the freehold had suf- fered,

(2) [See Note 269.]

(3) [See Note 270.]

[46. a.]

(1) [See Note 271.]

fered himselfe to be impleaded in a reall action by collusion to bar the lessee of his terme, and made default, &c. the statute of *Glouc'* gave the lessee for yeares some remedy by way of receipt, and a triall whether the demandant did move the plea by good right or collusion; and if it were found by collusion, then the termor should enjoy his terme, and the execution of the judgement should stay untill after the terme ended (2). But this statute extended not to 5 cases. First, if the lease were without writing, for the words of this act are, (so that the termor may have recovery by writ of covenant.) 2. It extended not but to a recovery by default (3). 3. The termor could not be relieved by this statute, unlesse he knew of the recovery, and were received, &c. 4. By the better opinion of bookes, it extended not to tenants by statute merchant, statute staple, or *delegis*. 5. Not to gardian. [7] But now the statute of 21 *H. 8.* doth give remedy in all the said cases saving the case of the gardian, and giveth them power to falsifie all manner of recoveries had against the tenants of the freehold upon fained and untrue titles, &c. Now the [m] statute saith, that it was a doubt before that statute whether a termor for yeares might falsifie or no: but yet it seemeth by the better opinion of books in so great variety, that he having but a chattell, was not able by the common law to falsifie a covenous recovery of the freehold, because he could not have the thing that was recovered (4). [n] And *Thirning* and *Hankford* doe hold that a gardian is not within the statute of *Glouc'*.

If two coparceners be, and one of them let her part to another for yeares, and after upon a writ of partition brought against the lessor too little is allotted to the lessor, it is holden by some that the lessee cannot avoid it, for that it is made by the oath of men, and judgement is thereupon given that the partition shall remaine firme and stable. But if there be two coparceners of three acres of land, every one of equal value, and the one coparcener letteth her part, and after make partition, and one acre is allotted onely to the lessor, the lessee is not bound hereby, but he may enter and take the profits of another half acre, for that of right belongs unto him (5). Thus much have I thought good to set downe, for it sufficeth not to know what the law is in these cases, unlesse he understand the reason and cause thereof.

And albeit (as hath beene said) a lease for yeares must have a certaine beginning, and a certaine end, yet the continuance thereof may be uncertaine, for the same may cease and revive again in divers cases (6). As if tenant in taile make a lease for yeares reserving xx. shillings, and after take a wife and die without issue, now as to him in the reversion the lease is meerly void: but if he indow the wife of tenant in taile of the land, (as she may be though the estate taile be determined) now is the lease as to the tenant in dower (who is in of the state of her husband) [a] revived againe as against her, for as to her the estate taile continueth, for she shall be attendant for the third part of the rent services, and yet they were extinct by act in law. So it is if tenant in taile make a lease for yeares

11. Co. 63.

[7] 21 H. 8. cap. 11.

[m] That a termor might falsifie at the Common Law vid. 19 E. 6. Ass. 68.  
21 E. 3. 1. "  
7 H. 7. 11. b.  
1 H. 7. 9. a.  
Pl. Com. 83.  
20 E. 3. 40.  
29 E. 3. resect 112.  
That he could not, 20 H. 6.  
Fauxer recovery 6. 43. Ass. 41.  
26 H. 8. 2.  
9 E. 4. 38.  
F. N. B. 198. E.  
14 H. 8. 4.  
6 Co. R. 135.  
Assoupre's case. [n] 7 H. 4. 12.  
33 H. 8. Dicr. 33.

[7. 60. 9. a.  
1. Ho. Abr. 543.)

[a] 10 E. 3. 26.  
24. Ass. 15.  
23 E. 3.  
Dower 190.  
[7. Co. 5. b.)

(2) [See Note 272.]

(3) Or *reddition*. 16 H. 7. 5. 21 H. 7. 25. 5 H. 7. 39. 8 H. 7. 6. 12 H. 8. 7. 27 H. 8. 7. 11 E. 4. 10. or on nihil dicit, or disclaimer. 9 E. 4. 37. by Danby, or in default of the vouchee at the grand cape or

securator sub periculo. 9 E. 4. 38. Hal. MSS.

(4) [See Note 273.]

(5) [See Note 274.]

(6) Vid. 7. Rep. the earl of Bedford's case. Hal. MSS.

*et supra*, and dyeth without issue, his wife ensuint with a sonne, he in the reversion enter, against him the lease is void, but after the sonne be borne the lease is good, if it be made according to the [b] statute, and otherwise is voydable.

The king made a gift in taile of the mannor of *Eastfarleigh* in *Kent*, to *W.* to hold by knights service; *W.* made a lease to *A.* for thirty-six yeares, reserving thirteene pound rent; *W.* died, his sonne and heire of full age. All this was found by office. As to the king this lease is not of force, for he shall have his *primer seisin*, as of lands in possession, but after livery, the lessee may enter; and if the issue in taile accept the rent, the lease shall binde him, for the king's *primer seisin* shall not take away the election of the issue in taile, for it may be that the rent was better than the land: [c] and so it was adjudged in *Awsen's* case, as I had it of the report of master *Edmond Plowden*, a grave and learned apprentice of law.

If tenant in fee take wife, and make a lease for yeares, and dieth, the wife is endowed, she shall avoid the lease, but after her decease the lease shall be in force againe. But if the patron grant the next avoydance, and after parson, patron, and ordinary, before the statute, [d] had made a lease of the glebe, for yeares, and after the parson dieth, and the grantee of the next avoydance had presented a clerke to the church, who is admitted, instituted, and inducted, and dieth within the terme; the patron presents a new clerke, and he is admitted, instituted, and inducted, albeit he cometh in under the patron that was party to the lease, yet because the last incumbent, who had the whole state in him, avoyded the lease, it shall not revive againe, no more than if a feme covert levy a fine alone, if the husband enter and avoyd the fine, and dye, the whole estate is so avoyded as it shall not binde the wife after his death (7).

[46. b.] If a woman be endowed of an advowson which is appropriated, and she present, and her incumbent is admitted, instituted, and inducted, albeit the incumbent die, yet is the appropriation wholly dissolved, because the incumbent, which came in by presentation, had the whole state in him; and so it was adjudged, as the case is to be intended (1).

Tenant in taile make a lease for forty yeares, reserving a rent, to commence ten yeares after: tenant in taile dye; the issue enter and enfeoffe *A.*; ten yeares expire, the lessee enter; if *A.* accept the rent, the lease is good, for he shall have the same election that the issue in taile had, either to make it good, or to avoid it, so as it could not be precisely affirmed, whether by the entry of the issue this executory lease was avoided, but it dependeth incertainly upon the will of the feoffee (2). But now I know you are desirous to heare *Littleton*, who is speaking to you.

"*Et quant le lessee enter per force del lease, donques il est tenant sur terme des ans.*" And true it is, that to many purposes he is not tenant for yeares until he enter: as a release made to him is not good to him to increase his estate, before entry; but he may release the rent reserved before entry, in respect of the privy. Neither can the lessor grant away the reversion by the name of the reversion, before

[b] 32 H. 8.  
ca. 28.

(1. Ro. Abr. 842.)

[c] Pasch. 2. & 3.  
Ph. & Mar. in  
an information of  
Intrusion in the  
Exchequer against  
Austen.  
Vid. Dier.  
Pasch. 2. & 3.  
Ph. & Mar. 115.  
13 Eliz. ca. 10. }  
[d] 6 E. 6.  
Dier 72.  
(Cro. Car. 592.)  
17 E. 3. 52.  
17. Ass. p. 17.  
3. R. 3. 20.  
9 H. 6. 33.  
(Hob. 7.)

(Hob. 205.  
10. Co. 43.)

2 E. 3. 8.  
per Scroope  
(1. Ro. Abr.  
240, 241.)

Pl. Com. 457. a.  
(1. Ro. Abr.  
831, 842, 843.  
1. Sid. 260, 261.)

(2. Ro. Abr. 403.  
Cro. Car. 110.  
400.)

V. Sect. 454, 455.

(7) Adjudged accordingly Cro. Cha.  
*Plowden v. Oldford* 582. But in Hill. 10.  
Eliz. C. B. E. 238. adjudged that the lease  
revived. *Polydore Vergil's* case. Hal. MSS.

[46. b.]

- (1) [See Note 275.]  
(2) [See Note 276.]

(Cro. Ja. 60.  
2. Co. 124.)

before entry. *Vide* Sect. 567. But the lessee before entry hath an interest, *interesse termini*, grantable to another. *Vide* Sect. 319. And albeit the lessor dye before the lessee enters, yet the lessee may enter into the lands, as our author himselfe holdeth in this Chapter. And so if the lessee dyeth before he entred, yet his executors or administrators may enter, because he presently by the lease hath an interest in him: and if it be made to two, and one dye before entry, his interest shall survive. *Vide* Sect. 281.

V. Sect. 615.  
more fully of this  
matter.  
(Sibb. 3.)

He that hath a lease for yeares, hath it either in his owne right, whereof *Littleton* hath here spoken, or in another's right, and that in divers manners; as a man may have a tearme for yeares in the right of his wife, whereof the husband hath power to dispose at any time during his life, and if he surviveth his wife, the law doth give the lease to him. But if he make no disposition thereof, and his wife survive him, it remaineth with the wife: but of this in another place more fully.

(1. Ro. Abr.  
344, 348.  
Flou. 191.)

If a man be possessed of a tearme of forty yeares in the right of his wife, and maketh a lease for twenty yeares, reserving a rent, and die, the wife shall have the residue of the terme, but the executors of the husband shall have the rent, for it was not incident to the reversion, for that the wife was not party to the lease (3). So note, a disposition of part of the terme is no disposition of the whole. But if the husband grant the whole terme, upon condition that the grantee shall pay a summe of money to his executors, &c. the husband die, the condition is broken, the executors enter, this is a disposition of the terme, and the wife is barred thereof, for the whole interest was passed away (4).

Hil. 17 El. in the  
King's bench.  
(Fent. 321.  
2a. Co. 51.  
Hutt. 17.)

If a lease be made to a baron and feme for terme of their lives, the remainder to the executors of the survivor of them, the husband grant away this terme and dieth, this shall not barr the wife, for that the wife had but a possibility, and no interest.

37. Ass. p. 11.  
Pl. Com. 418. b.  
(1. Ro. Rep. 359.)

If the husband and wife be ejected of a terme in the right of his wife, and the husband bring an *ejectione firme* in his owne name (5), and have judgement to recover, this is an alteration of the terme, and vesteth it in the husband (6).

If a lease for yeares be made to a bishop and his successors, yet his executors or administrators shall have it *in auter droit*, for regularly no chattell can goe in succession in a case of a sole corporation, no more then if a lease be made to a man and his heires it can goe to his heires. But let us returne to *Littleton* (7).

5 Co. 1.  
Chayton's case.  
12 ELZ.  
Dyer 286.  
(2. Ro. Abr.  
350. Cro.  
Ja. 136.  
Fent. 325. n.)  
24 EL Dy. 307.  
5 EL Dy. 313.  
(1. Ro. Abr. 849,  
590. Cro. Cha. 78.)

Touching the time of the beginning of a lease for yeares, it is to be observed, that if a lease be made by indenture, bearing date 26 *Maui*, &c. to have and to hold for twenty one yeares, from the date, or from the day of the date (8), it shall begin on the twenty seventh day of *May* (9). If the lease beare date the twenty sixth day of *May*, &c. to have and to hold from the making hereof, or from henceforth, it shall begin on the day on which it is delivered, for the words of the indenture are not of any effect till the delivery, and thereby from the making, or from henceforth, take their first effect. But if it be *à die consecutionis*, then it shall begin on the next day after the deliverie. If the *habendum* be for the terme of twenty

one

(3) [See Note 277.]

(4) [See Note 278.]

(5) [See Note 279.]

(6) [See Note 280.]

(7) *Hic fol. 9. a. Hal. MSS.*

(8) [See Note 281.]

(9) [See Note 282.]



one yeares, without mentioning when it shall begin, it shall begin from the deliverie, for there the words take effect, as is aforesaid. If an indenture of lease beare date which is void or impossible, as the thirtieth day of *Februarie*, or the fortieth of *March*, if in this case the terme be limited to begin from the date, it shall begin from the delivery, as if there had been no date at all. [a] And so it is, if a man by indenture of lease, either recite a lease which is not, or is void, or misrecite a lease in point materiall which is *in case*, to have and to hold from the ending of the former lease, this lease shall begin in course of time from the deliverie thereof (10).

"*Et si le lessor en tiel case reserve a luy un annual rent sur tiel lease il poet esier a distreynner pur le rent, ou il poet aver action de debt pur les arerages.*"

[47. a.] "*Reserve a luy un annual rent, &c.*" First, it appeareth [δ] here by *Littleton* that a rent must be reserved out of the lands or tenements, whereunto the lessor may have resort or recourse to distreine, as *Littleton* here also saith, and therefore a rent cannot be reserved by a common person (1) out of any incorporeall inheritance, as advowsons, commons, offices, corodie, mulcture of a mill, tythes, fayres, markets, liberties, privileges, franchises, and the like. [c] But if the lease be made of them by deed (2) for yeares, it may be good by way of contract to have an action of debt, but distreine the lessor cannot. Neither shall it passe with the grant of the reversion, for that it is no rent incident to the reversion (3). But if any rent be reserved in such case upon a lease for life, it is utterly void, for that in that case no action of debt doth lie (4). But if a man demiseth the vestare or herbage of his land, he may reserve a rent, for that the thing is maynorable, and the lessor may distreine the cattell upon the land (5): and so a reversion, or a remainder of lands or tenements may be granted reserving a rent, for the apparent possibility that it may come in possession (6), and they are tenements within the words of *Littleton*.

8 H. 7. 39. 21 H. 7. 19. 17 E. 2. Ex. 128.

[a] It appeareth by *Littleton*, that *reservando* is an apt word of reserving a rent, and so is *reddendo*, *solvendo*, *faciendo*, *inveniendo*, *dummodo*, and the like (7).

26. Ass. 66. 32 E. 3. 201. 5 E. 4. 2. 10 El. Dy. 276. Pl. Com. en. Browning and Beeton's case, 60. 131, 132, 300.

[b] And note a diversity between an exception (which is ever of part of the thing granted and of a thing *in case*) for which, *exceptis*, *salvo*, *preter*, and the like, be apt words; and a reservation which is alwaies of a thing not in *case*, but newly created or reserved out of the

25 H. 6. 34. 17. Ass. 14 H. 6. 1. 44 E. 3. 43. Pl. Com. 367.

(10) [See Note 283.]

[47. a.]

(1) [See Note 284.]

(2) [See Note 285.]

(3) [See Note 286.]

(4) [See Note 287.]

(5) Quare, *how assise shall be brought in case of herbage.* 17 E. 3. 75. Hal. MSS.

(6) [See Note 288.]

(7) [See Note 289.]

2. Ch. 3.  
Goddard's case.

[a] Pl. Com.  
148. 3 E. 6. 61.  
Leases Br. 62.  
3 El. Dy. 195.  
1 Mar. Dyer 126.  
(Cro. Car. 400.  
2 Ro. Abr. 62.  
1 Ro. Abr. 249.  
1 Sed. 400.)

[b] 7. Co. 23.  
But's case.  
10. Co. 59, 60.  
(Cro. Ja. 173.  
Post. 142. a.  
144. a.  
5. Co. 3.  
2. Scaud. 203.  
2 Ro. Abr.  
446. 5. Co.  
Mountjoy's case  
Noy 60.)  
[c] 30. Ass.  
p. 5.  
12. Ass. 20.  
20 H. 4. 10.  
1 H. 4. 1, 2, 3.  
11 H. 4. 82.  
19 E. 2.  
Fines 136.  
44 E. 3. 46.  
9. Ass. 24.  
20. Ass. 60.  
14 E. 3.  
Scir. fac. 132.  
5 E. 3. 68.  
17 E. 3. 75.  
11 H. 4. 40.  
5 H. 6. 21. 46.  
10 H. 6. 12.  
21 H. 6. 11.  
23 El. Dyer 377.

[a] 40 E. 3. 47.  
5 E. 3. 67.  
21 E. 4. 62.  
3 H. 6. 46.  
31. Ass. p. 30.  
3. Ass. 9.

[b] 50 E. 3. 13.  
13. Ass. 9.  
36 E. 3. 10.  
21 E. 3. 4.  
34. Ass. 11.  
20 E. 3. 14.  
3 H. 6. 46.  
10 H. 6. 8. 41.  
33 H. 6. 1.

[c] Bract. li. 2.  
§ 38. b.  
2 E. 349.  
[d] 9 El.  
Dy. 304.  
38 H. 6. 36.  
14 H. 8. 1.  
22 E. 3. 8.  
9 E. 3. 66.  
5 E. 3. 66.  
34. Ass. 11.

[e] 5 E. 4. 4.  
14 E. 3.  
bre. 382.  
8. Ca. 70, 71.

[f] Vid. Sect.  
214, 215, 216,  
Sec. 10 E. 4. 12.  
11 E. 3.  
Ass. 86.  
27 H. 6. 10.  
21 H. 7. 26.  
30 H. 8.  
Dy. 46.

[g] Mich. 5 Jo.  
in repl. inter  
Wootton & Ed-  
win, Bank le roy.  
Hil. 33. El. Rot.  
1431. in bank le  
roy, inter Rich-  
mond & Butcher.  
(Post. 215. b.  
2. Ro. Abr. 490.  
13. Co. 34.  
2. Ro. Abr. 243.)  
Vid. for this word  
Distresse,  
Sect. 136.

[h] 14 A. 2. 28.  
2 E. 3. tit.  
Distress. 8 R. 8.  
Rescous 11.  
7 E. 3.  
Avoir. 190.  
15 H. 2.  
Avoir. 2.  
(1. Ro. Abr. 666.  
Cro. El. 593.)  
[i] 29 E. 4.  
40 b.  
7 H. 7. 1. b.  
23 E. 4. 36.  
4 E. 6. tit.  
Dist. Br. 74.  
(Cro. El. 596.  
Noy 181.)

the land of tenement demised. [c] *Poterit enim quis rem dare et partem rei retinere, vel partem de pertinentiis, et illa pars quam retinet semper cum eo est et semper fuit.* [d] But out of a generall a part may be excepted, as out of a mannor, an acre, *ex verbo generali aliquid excipitur*, and not a part of a certainty, as out of twenty acres one.

It is further to be observed, that the lessor cannot reserve to any other but to himselfe, for *Littleton* saith, *reserve a lay*, reserved to himselfe. [e] If two jointnants be, and they make a lease for yeares by paroll, or deed poll, reserving a rent to one of them, this shall enure to them both; but if it be so reserved by deed indented, it shall enure to him alone by way of conclusion.

[f] *Littleton* here is putting of a case, and not making a lease, for then he would not reserve the rent to him, but to him and his heires, for otherwise the rent shall determine by his death, if he die within the terme (8). [g] But if he reserve a rent generally without shewing to whom it shall goe, it shall go to his heires. If he reserve a rent to him and his assignes, yet the rent shall determine by his death, because the reservation is good but during his life. So it is if he reserve a rent to him and his executors it shall end by his death, because the heire hath the reversion, and the rent was incident to the reversion (9). So if a man warrant land to B. and his assignes, the assignee must vouch during the life of B. for the warranty continues but only during the life of B. for the warranty is but for life, for want of words of inheritance. But if the warranty be to B. his heires and assignes, so as he hath an inheritance therein, then his assignee shall vouch after his decease. So if the rent be reserved to the lessor, his heires and assignes, so as it be incident to the inheritance, then shall all the assignes of the reversion enjoy the same.

"*Annual rent.*" So it is if the rent be reserved every two or three or more yeares (10). Of rents *Littleton* doth excellently treat hereafter in his Chapter of Rents, and therefore in this place thus much shall suffice.

"*A distreyner sur le rent.*" Here it is necessary to be seene of what things a distresse may be taken for a rent, and how the distresse ought to be demeaned. [h] 1. It must be of a thing whereof a valuable propertie is in some body, and therefore dogs, bucks, does (11), conies, and the like that are *ferre nature* (12) cannot be distreynd. 2. Although it be of valuable propertie, as a horse, &c. yet when a man or woman is riding on him, or an axe in a man's hand cutting of wood and the like, they are for that time privileged and cannot be distreynd (13). [i] 3. Valuable things shall not be distreined for rent for benefit and maintenance of trades, which by consequent are for the common wealth, and are there by authority of law; as a horse in a smith's shop shall not be distreynd for the rent issuing out of the shop, nor the horse, &c. in the hostry, nor the materials in the weaver's shop for making of cloth, nor cloth

or

(8) [See Note 290.]  
(9) [See Note 291.]  
(10) See further as to reservation of rent, Vin. Abr. title *Reservation*, and Gilb.

Treat. on Rents.

(11) [See Note 292.]  
(12) [See Note 293.]  
(13) [See Note 294.]

or garments in a taylor's shop (14), nor sacks of corne or meale in a mill, nor in a market, nor any thing distrayned for damage *feasant*, for it is in custody of law, and the like.

[*k*] 4. Nothing shall be distrayned for rent, that cannot be rendered againe in as good plight as it was at the time of the distresse taken (15); as sheaves or shokes of corne or the like cannot be distrayned for rent (16), but for damage *feasant* they may be distreynd (17). But charretts or carts with corne may be distreynd for rent, for they may be safely restored.

[*l*] 5. Beasts belonging to the plow (18), *averia caruce*, shall not be distreynd (which is the ancient common law of *Eng'land*, for no man shall be distrained by the utensils or instruments of his trade or profession, as the axe of the carpenter, or the bookes of a schol-

[47. b.] ler) while goods or other beasts, which *Bracton* calls *animalia*, (or *catella*) *otiosa*, may be distrained. [*m*] 6. Furnaces, caudrons, or the like, fixed to the freehold, or the doores or windowes of a house, or the like cannot be distrained (1). [*n*] Lastly, beasts that escape (2) may be distrained for rent, though they have not been *levant* and *couchant* (3). [*o*] Note, that he that distraines any thing that hath life, must impound them in a lawfull pownd within three miles in the same county, and that is either overt or open, in a pinfold made for such purposes, or in his owne close, or in the close of another by his consent (4). And it is there called open, because the owner may give his cattle meat and drinke without trespasse to any other, and then the cattle must be sustained at the perill of the owner. [*p*] Or it is a pownd covert or close, as to impound the cattle in some part of his house, and then the cattle are to be sustained with meat and drink at the perill of him that distraineth, and he shall not have any satisfaction therefore. But if the distresse be of utensils of houshold, or such like dead goods which may take harme by wet or weather, or be stolne away, there he must impownd them in a house or other pownd covert within three miles within the same county, for if he impownd them in a pownd overt he must answer for them.

lib. 2. cap. 37. 5 H. 7. fol. 9. [*p*] 33 H. 8. tit. distres. Br. 66.

[*q*] If the distresse be taken of goods without cause, the owner may make rescous; but if they be distrained without cause, and impounded, the owner cannot breake the pownd and take them out, because they are then in the custody of the law.

[*r*] But if a man distraine cattle for damage *feasant*, and put them in the pownd, and the owner that had common there make fresh suite, and finde the door unlocked (5), he may justifie the taking away of the cattle in a *parco fracto*. [*s*] If the owner breake the pownd, and take away his goods, the party distraining may have his action *de parco fracto*, and he may also take his goods that were distrained wheresoever he find them, and impownd them againe.

It

(14) [See Note 295.]  
(15) 20 H. 7. 9. 13. 21 E. 4. 47.  
IIal. MSS.  
(16) [See Note 296.]  
(17) [See Note 297.]  
(18) [See Note 298.]

[47. b.]  
(1) [See Note 299.]  
(2) [See Note 300.]  
(3) [See Note 301.]  
(4) [See Note 302.]  
(5) [See Note 303.]

[*k*] 19 E. 3. 4. a.  
11 H. 7. 14. a.  
21 H. 7. 39. b.  
22 E. 4. 50. b.  
3 H. 4. 15.  
(1 Ro. Abr. 667.)

[*l*] Okcham 38.  
39. Bra. lib. 4.  
l. 217.  
F. N. B. 90. a.  
Reg. 97.  
Flet. lib. 2.  
ca. 41.  
Murr. ca. 2.  
Sect. 15. 16.  
4 E. 3. 1.  
29 E. 3. 17.  
[*m*] 21 H. 7. 35.  
3 E. 3.  
Ass. 46. 9.  
[*n*] 7 H. 7. 1. b.  
10 H. 7. 21.  
11 H. 7. 4. a.  
15 H. 7. 17.  
18 E. 3.  
avowrie 219.  
6 E. 4.  
22 E. 4. 49.  
4 E. 3.  
distres. 18.  
27 E. 3. 80.  
3 H. 4. 16.  
(2. Leon. 7.  
Doct. and Stud.  
lib. 2. c. 37.)  
[*o*] Marlebr. cap. 4.  
W. 1. cap. 16.  
2 & 3. Ph. and  
Mar. cap. 13.  
Fleta, lib. 2.  
cap. 30.  
6 H. 3. avowrie  
343.  
30 Ass. 38.  
1 H. 6. 9.  
23 E. 4. 11.  
F. N. B. 89.  
Doct. and Stud.  
(1 Ro. Abr. 673.)

[*q*] 4 E. 6.  
tit. distres. 74.  
F. N. B. 100 E.  
(Post. 160. b.)

[*r*] 3 E. 3. tit.  
trans. 11.

[*s*] 34 H. 6. 18.

[c] Regist.  
F. N. B. 100, 101.

It is called a writ *de parco fracto* of these words in the writ [c], *Parcum illum vi et armis fregit*. And the forme thereof appeares in the *Register* and *F. N. B.*

(Doct. and Stud.  
lib. 2. cap. 9.)

But it is to be observed, that for the rent due the last day of the tearme, the lessor cannot distraine, because the terme is ended (6); and therefore some use to reserve the last halfe year's rent at the feast of the nativite of Saint *John Baptist* before the end of the terme, so as if the rent be not then paid, he may distraine betweene that and *Michaelmasse* following (7).

(1 Ro. Abr.  
601. Post. 302. b.)

"*Action de debt.*" Note a diversitie betweene a rent reserved upon a lease for yeares, reserving a yearely rent: the lessor may have severall actions of debt for every yeare's rent. But upon a bond or contract for payment of several summes, no action of debt lieth till the last day be past (8). But otherwise it is of a recognizance, which see at large and the reason thereof cap. Releases, Sect. 512, 513.

[u] 7 H. 6. 13.  
4 Co. 49.  
3 Co. 16.  
24 E. 1. tit.  
Apprent. 333.  
32 H. 7.  
Br. roll. 11.  
F. N. B. 82, 83.  
Glanv. lib. 9. cap.  
36.  
Fleta, lib. 2. cap.  
40 and lib. 3. cap. 14.  
1 Ro. Abr. 598.)

[u] Note, that the lord shall not have an action of debt for relief or for escuage due unto him, because he hath other remedie; but his executors or administrators shall have an action therefore, because it is now become as a flower falne from the stocke, and they have no other remedy. Neither shall the lord have an action of debt for aid *pur file marier*, or *faire fitz Chivaler*, for the cause aforesaid.

"*Mes en tiel case il covient, que le lessor soit scieie (9) de mesmes les tenements al temps del lease, car est bone fieu pur le lessee a dire, que le lessor n'avoit reins en les tenements al temps del lease*" And the reason of this is, for that in every contract there must be *quid pro quo*, for *contractus est quasi actus contra actum*; and therefore if the lessor hath nothing in the land, the lessee hath not *quid pro quo*, nor any thing for which he should pay any rent. And in that case he may also plead, that the lessor *non dimisit*, and give in evidence the other matter (10).

[x] 48 E. 3. 7.  
20 E. 4. 10.  
34 H. 6. 48.  
35 H. 6. 34.  
9 H. 6. 36.  
11 H. 4. 22.  
[y] 2 E. 2.  
Estop. 243.  
39 E. 3. 13.  
Pl. Com. 434.  
18 E. 3. 70.  
15 E. 3.  
Estop. 236.  
16 H. 4. 32.  
(Mo. 20.)

"*Si [x] non que le lease soit per fait indent, &c.*" If the lease be made by deed indented, then are both parties concluded, [v] but if it be by deed poll the lessee is not estopped to say, that the lessor had nothing at the time of the lease made. *A.* lessee for the life of *B.* makes a lease for yeares by deed indented, and after purchases the reversion in fee. *B.* dieth, *A.* shall avoid his owne lease, for he may confesse and avoid the lease which took effect in point of interest, and determined by the death of *B.* But if *A.* had nothing in the land, and made a lease for yeares by deed indented, and after purchase the land, the lessor is as well concluded as the lessee to say, that the lessor had nothing in the land (11); and here it worketh only upon the conclusion, and the lessor cannot confesse and avoid, as he might in the other case. [z] If a man take a lease of his owne land by deed indented reserving a rent, the lessee is concluded. [a] But if a man take a lease of the herbage of his owne land by deed indented, this is no conclusion to say, that the lessor had nothing in the land,

[z] 14 H. 6. 23.  
8 H. 4. 7.  
[a] Resolve  
Pasc. 2 Eliz. in  
Commun Banco.  
(Cro. Cha. 110.)

(6) [See Note 304.]

(7) [See Note 305.]

(8) See New Abr. *Debt*, B. and Vin.  
Abr. *Debt*, O.

(9) [See Note 306.]

(10) 18 E. 3. 16. *Brief* 747. *Dy.* 122.  
*Martyn and Hardey.* Hal. MSS.

(11) [See Note 307.]

land, because it was not made of the land itselfe: [b] but if a man take a lease for yeares of his owne land by deed indented, the estoppel doth not continue after the terme ended (12). For by the making of the lease, the estoppel doth grow, and consequently by the end of the lease, the estoppel determines (13), [c] and that [48.a.] part of the indenture which belonged to the lessee, doth after the terme ended belong to the lessor, which should not be if the estoppel continued.

[b] Mich. 31  
& 32 Eliz. in Communi  
Banco adjudge in  
London's case.

[c] 38 H. 6. 24.  
30 E. 3. 31.  
(Post. 239. a.)

## Sect. 59.

**E***T est ascaroir, que en lease pur terme de ans, per fait ou sans fait, il ne besoygne aucun liverie de seisin d'estre fait al lessee, mes il poit entrer quant il voet per force de mesme le lease. Mes des feoffments faits en pais, ou dones en le taile, ou lease pur terme de vie; en tiels cases ou franktenement passera, si ceo soit per fait ou sauns fait, il covient aver un livery de seisin.*

**A***ND* it is to be understood, that in a lease for yeares, by deed or without deed (1), there needs no livery of seisin to be made to the lessee, but he may enter when he will by force of the same lease. But of feoffments made in the country, or gifts in taile, or lease for terme of life; in such cases where a freehold shall passe, if it be by deed or without deed, it behoveth to have livery of seisin.

**"L***IVERIE de seisin."* (2) *Traditio, or deliberatio seisinæ,* is a solemnity, that the law requireth for the passing of a freehold of lands or tenements by deliverie of seisin thereof. [b] *Intervenire debet solennitas in mutatione liberi tenementi, ne contingat donationem deficere pro defectu probationis* (3).

And there be two kinds of livery of seisin, viz. a liverie in [c] deed, and a livery in law. A livery in deed is when the feoffor taketh the ring of the doore, or turfe or twigge of the land, and delivereth the same upon the land to the feoffee in name of seisin of the land, &c. *per hostium et pur haspam et annulum vel per fustem vel baculum, &c.*

A. seised of an house in fee, and being in the house, [d] saith to B. I demise to you this house for terme of my life; this is a good beginning to limit the state, but here wanteth livery (4). A livery in deed may be done two manner of wayes. By a soleme act and words; as by delivery of the ring or haspe of the doore, or by a branch or twigge of a tree, or by a turfe of the land, and with [c] these or the like words, the feoffor and feoffee both holding the deed of feoffment, and the ring of the doore, haspe, branch, twigge, or turfe; and the feoffor saying, Here I deliver you seisin and possession

19 E. 3. fo. 16.  
41 E. 3. 17.  
40 Ass. 10.  
3 Ass. 1.  
2 E. 3. 4.  
48 E. 3.  
Feoff. 51.  
Pl. Com. 25. a.  
& 303. b.  
Vid. Sect. 66.  
(Post. 210.)  
[b] Bract. lib. 2.  
ca. 15.  
[c] Bract. lib. 2.  
ca. 15. & 18.  
Brit. ca. 33.  
in fine fo. 87.  
Flet. lib. 3.  
cap. 15.  
[d] 6 Co. 26.  
Sharp's case.

[c] See of this  
more Sect. 60.  
(3 Ro. Abr. 7.)

(12) [See Note 308.]

(13) [See Note 309.]

[48. a.]

(1) As to the distinction at common law between hereditaments lying in livery, which may be passed for any estate without deed or even writing, and those lying in grant, which could be transferred by deed only, and the alteration of our ancient law by the 29 Cha. 2. c. 3. which requires a deed or writing in most

cases, see *infra*, n. 3. ante 9. a. and post. 49. a. 121. b. 169. a.

(2) For the origin and history of the transfer of lands by livery of seisin, see 2. Blackst Comment. 311. Mad. Formul. Anglic. Dissert 9. and Spelm. Gloss. and Du. Fresn. Gloss voce *Investitura*.

(3) [See Note 310.]

(4) 9. Rep. 13. *Thoroughgood's case* MSS.

41 E. 3. 17. b.  
41 Ass. p. 10.  
88 Ass. p. 2.  
38 E. 3. 11.  
30 Ass. p. 12.  
26 Ass. 39.  
37 Ass. p. 61.  
18 E. 3. 6. 16.  
6 Co. 26.  
Sharp's case.  
(Post. 37.  
Cro. Jam. 80.)

43 E. 3. 6t.  
Feoff. 51.  
35 H. 8.  
Feoff. Br.  
(9 Co. 136. b.  
1 Leon. 207.)

50 E. 3. Rot.  
Parl. nu. 30.

(Post. 50. a.)  
13 E. 3.  
Estop. 177.

Ibidem.  
(2 Co. 246.  
Post. 212.)  
7 E. 4. 25.  
20 Ass. 40.  
10 Ass. 19.  
43 Ass. 20.  
(Hob. 171.  
Flow. 155. 197.  
1 Sid. 82.  
2 Ro. Abr. 7.  
1 Co. 127, 129.  
Cro. Ja. 376.)  
Mich. 33. & 34.  
Eliz. in the King's  
Bench inter Hogge  
Crosse for lands  
in London.  
Vid. Pl. Com. 395.  
See more of this  
Sect. 66.  
11 H. 4. 71.  
19 Ass. 9.  
19 H. 8. 9. b.  
(2 Ro. Abr. 8.  
Post. 359.  
2 Sid. 61.)  
Bridgewater's  
case.  
(Ante 4. b.  
Post. 190. b.)

session of this house, in the name of all the lands and tenements contained in this deed, according to the forme and effect of this deed; or by words without any ceremony or act (5); as, the feoffor being at the house doore, or within the house, Here I deliver you seisin and possession of this house, in the name of seisin and possession of all the lands and tenements contained in this deed; *et sic de similibus*: or, Enter you into this house or land, and have and enjoy it according to the deed: or, Enter into the house or land, and God give you joy: or, I am content you shall enjoy this land according to the deed; or the like. For if words may amount to a livery within the view, much more it shall upon the land (6). But if a man deliver the deed of feoffment upon the land, this amounts to no livery of the land, for it hath another operation to take effect as a deed: but if he deliver the deed upon the land in name of seisin of all the lands contained in the deed, this is a good livery: and so are other books intended that treat hereof, that the deed was delivered in name of seisin of that land. Hereby it appeareth, that the delivery of any thing upon the land in name of seisin of that land, though it be nothing concerning the land, as a ring of gold, is good, and so hath it bene resolved by all the judges; and so of the like.

If divers parcels of land be conteyned in a deed, and the feoffor delivers seisin of one parcell according to the deed, all the parcels doe passe, albeit he saith not (in name of all, &c.) because the deed containeth all. And so if there be divers feoffees, and he make livery to one according to the deed, the land passeth to all the feoffees (7); and yet the plainer way is to say (in the name of the whole, or of all the feoffees) (8).

If a man make a charter in fee, and deliver seisin for life *secundum formam carte*, the whole fee simple shall passe, for it shall be taken most strongly against the feoffor. Note, that these words (*secundum formam carte*) are understood according to the quantitie and quality of the effectuall estate contained in the deed. If a man make a lease for yeares by deed, and deliver seisin according to the forme and effect of the deed; yet he hath but an estate for yeares, [48. b.] and the livery is void, as *Littleton* saith. So if *A.* by deed give land to *B.* to have and to hold after the death of *A.* to *B.* and his heires, this is a void deed, because he cannot reserve to himselfe a particular estate, and construction must be made upon the whole deed; and if livery be made according to the forme and effect of the deed, the livery also is void, because the livery referreth to a deed that hath no effect in law, and therefore it cannot worke *secundum formam et effectum carte* (1). And so it was adjudged, *et sic de similibus*. \* And it is to be observed, that neither the feoffor being absent can make livery, nor the feoffee being absent can take livery, but by warrant of attorney, by deed, and not by parol, because it concerneth matter of freehold (2).

*Vide* Sect. 1. in *Bridgewater's* case, where a man hath a moveable estate of inheritance, for example there put, in 13 acres: the question is, where livery shall be made. First, if they be parcel of a mannor, they may passe by the name of the mannor; but if they be in grosse, then the charter of feoffment must be of 13 acres lying and being

(5) [See Note 311.]

(6) But Cro. Jam. 80. and Ley 2. seem  
*contra*.

(7) But if it be without deed nothing passes  
to the others. Dy. 14. 35. Hal. MSS.

(8) 15 E. 4. 18. 18 E. 4. 12. 18 H.

6. 9. 22 H. 6. 1, 40 E. 3. 40. Hal.  
MSS.

[48. b.]

(1) [See Note 312.]

(2) [See Note 313.]

being in the meadow of 80 acres, generally, without bounding or describing of the same in certaintie; and livery of the seisin of any 13 acres allotted to the feoffee for a yeare *secundum formam carte* is a good livery to passe the content of 13 acres wheresoever the same lie in that meadow. In the second case, where one entire mannor is separate and divided, as is aforesaid, there is no question but the livery must be made of that mannor; but in the other case, where two manors are separate, and divided *alternis vicibus*, there the charter of feoffment must be made of both, and liverie in that mannor which he is seised of in any one yeare *secundum formam carte*, and the next yeare in the other *secundum formam carte*: for there are two distinct manors, and severall estates in them (3).

A livery in law is, when the feoffor saith to the feoffee, being in the view of the house or land, (I give you yonder land to you and your heires, and goe enter into the same, and take possession thereof accordingly) and the feoffee doth accordingly in the life of the feoffor enter, this is a good feoffment, for *signatio pro traditione habetur* (4). And herewith agreeth *Bracton: Item dici poterit et assignari, quando res vendita vel donata sit in conspectu, quam venditor et donator dicit se tradere*: and in another place he saith, *in seisinâ per effectum et per aspectum*. But if either feoffor or the feoffee die before entry the livery is voyd (5). And livery within the view is good where there is no deed of feoffment. [a] And such a liverie is good albeit the land lie in another county. [b] A man may have an inheritance in an upper chamber, though the lower buildings and soile be in another, and seeing it is an inheritance corporeall it shall passe by livery. [c] A man maketh a charter of feoffment and delivers seisin within the view, the feoffee dares not enter for feare of death, but claimes the same, this shall vest the freehold and inheritance in him, albeit by the livery no estate passed to him, neither in deed nor in law, so as such a claime shall serve, as well to vest a new estate and right in the feoffee, as in the common case to revest an ancient estate and right in the disseisee, &c. as shall be said hereafter more at large in the Chapter of Continuall Claime. And so note a liverie in law shall be perfected and executed by an entry in law. [d] If a man be disseised, and make a deed of feoffment and a letter of attorney to enter and take possession, and after to make livery *secundum formam carte*, this is a good feoffment albeit he was out of possession at the time of the charter made (6), for the authority given by the letter of attorney is executory, and nothing passed by the delivery of the deed till livery of seisin was made. And in ancient letters of attorney power is given to others to take possession for the feoffor. But if a man be disseised, and make a writing of a lease for yeares and deliver the deed, and after deliver it upon the ground, the second delivery is voyde, for the first delivery made it a deed, and for that the lease for yeares must take effect by the delivery of the deed, therefore the deed delivered when he was out of possession was voyde. But so it is not of a charter of feoffment, for that takes effect by the livery and seisin. But if the lessor had delivered it as an escrowe, to be delivered as his deed upon the ground, this had beene good.

A man

Vide Sect. 1.

38 E. 3. 11.  
38 Ass. p. 2.  
43 Ass. p. 20.  
Temps H. 8. tit.  
Feoffments  
Br. 70.  
18 E. 3. 16. b.  
28 H. 8. F. 18.  
9 E. 4. 39. per  
Moyle. Bract.  
lib. 2. cap. 18.  
& lib. 4.  
fo. 235. a.  
(1 Co. 156.  
Post. 253. a.  
[a] 9 E. 4. 39.  
38 E. 3. 11.  
[b] 9 E. 4. 28.  
40. 5 H. 7. 9.  
3 H. 6. tit.  
Plaint 1.  
11 H. 4. 32.  
11 E. 3. Ass. 86.  
[c] 38. Ass. p. 23.

[d] Hill. 87.  
Eliz. Rot. 630.  
in com. Banco.  
inter Browne &  
Terry adjud.  
Dyer 16.  
Eliz. 234.  
3 Eliz.  
Dyer 131.  
(6. Co. 26.)

3 Co. 36.  
inter Jennings  
& Bragge.

(3 Co. 31. b.  
3 Co. 38. b.)

(3) [See Note 314.]

Hal. MSS.

(4) [See Note 315.]

(6) [See Note 316.]

(5) 1. Rep. rector of Cheddington's case.

(2. Ro. Abr.  
4. Dy. 33. a.  
Mo. 11.)

2. Co. 31, 32.  
Mettinworth's case.

7 E. 4. 26. a.  
pertouts les Just.  
11 H. 4. 71.  
Pl. Com. 163.  
10 E. 4. 3.

(Mo. 99.)

2 Co. 35, 36.  
Sir R. Heyward's  
case.  
(1. Sid. 25, 26.  
83. 8 Co. 94.  
3. Lea. 371.)  
1 R. 3. ca. 1.  
21 H. 7.

A man makes a lease for yeares and after makes a deed of feoffment and delivers seisin, the lessee being in possession and not assenting to the feoffment, this livery is voyd; for albeit the feoffor hath the freehold and inheritance in him, yet that is not sufficient, for a livery must be given of the possession also (7); but if the lessee be absent, and hath neither wife nor servants (though he hath cattell) upon the ground, the livery of seisin shall be good.

If a man be seised of an house, and of divers severall closes in one countie in fee, and makes a lease thereof for yeares, and afterward maketh a feoffment in fee of the same, and makes liverie of seisin in the closes (the lessee or his wife or servants then being in the house) the livery is voyd for the whole: for the lessee cannot be upon every parcell of the land to him demised, for the preservation of continuance of his possession therein. And therefore his being in the house, or upon any part of the land to him demised, is sufficient to preserve and continue his possession in the whole from being ousted or dispossessed (8).

Note a great diversity, when a man hath two waies to passe lands, and both of the waies be by the common law, [49. a.] and he extendeth to passe them by one of the wayes, yet *ut res magis valeat* it shall passe by the other. But where a man may passe lands either by the common law, or by raising of an use, and settling it by the statute, there in many cases it is otherwise (1). For example, if a man be seised of two acres in fee, and letteth one of them for yeares, and intending to passe them both by feoffment, maketh a charter of feoffment, and maketh livery in the acre in possession, in name of both, onely the acre in possession passeth by the livery; yet if the lessee attorne, the reversion of that acre shall passe by the deed and attornment, for he is in by the common law, and in the *per* in both, and so in the like. But otherwise it is, if the father make a charter of feoffment to his son, and a letter of attorney to make livery, and no livery is made, yet no use shall rise to the son, because he should be in by the statute in another degree, viz. in the *post*, and the intention of the parties worke much both in the raising and direction of uses. So if *cesty que use* and his feoffees had joyned in a feoffment after the statute of 1 R. 3. &c. it had bene the feoffment of the feoffees, and the confirmation of *cesty que use*, for the state at the common law shall be [preserved]. So to conclude this point; of freehold and inheritances, some be corporeall, as houses, &c. lands, &c. these are to passe by liverie of seisin, by deed or without deed; some be incorporeall, as advowsons, rents, commons, estovers, &c. these cannot passe without deed, but without any liverie (2.) And the law hath provided the deed in place or stead of a livery. And so it is if a man make a lease, and by deed grant the reversion in fee, here the freehold with attornment of the lessee by the deed doth passe, which is in lieu of the livery. See *Bract*. lib. 2. cap. 18. *Et est traditio de re corporali de personâ in personam de manu, &c. gratuita translatio, et nihil aliud est traditio in uno sensu, nisi in possessionem inductio, de re corporali; et ideo dicitur, quod res incorporales non patiuntur traditionem sicut ipsum jus quod rei sive corpori inheret, et quia non possunt res incorporales possideri sed quasi, ideo traditionem non patiuntur.*

This

(7) [See Note 317.]  
(8) [See Note 318.]

[49. a.]  
(1) [See Note 319.]  
(2) See ante. 9. a. 47. a. 48. a. and post. 121. b. and 169. a.



This ancient manner of conveyance by feoffment and livery of seisin, doth for many respects exceed all other conveyances. For (as hath bene said) (3) if the feoffor be out of possession, neither fine, recovery, indenture of bargain and sale inrolled, nor other conveyance, doth avoid an estate by wrong, and reduce cleerly the estate of the feoffee, and make a perfect tenant of the freehold, but onely livery of seisin upon the land: the other conveyances being made off from the ground, doe sometimes more hurt then good, when the feoffor is out of possession (4). And yet in some cases a freehold shall passe by the common law without livery of seisin; as if a house or land belong to an office, by the grant of the office by deed, the house or land passeth as belongeth thereunto. So if a house or chamber belong to a corodie, by the grant of a corodie, the house or chamber passeth. A freehold may by custome be surrendered without livery, as hereafter shall be said (6): and so of assignement of dower *ad ostium ecclesiæ*, or otherwise, and by exchange a freehold may passe without livery, as hereafter shall be said in this Chapter.

2 Co. 55.  
Buckler's case.

1 H. 7. 28.  
8 H. 7. 4.  
31 H. 6. 16.  
8 H. 7. 4. M.  
31 E. 1. coram  
Rege. Ranulph.  
Huntingset's  
case. (6)  
3 E. 3. Coron.  
310. 11 H. 4.  
83. V. Sect. 74.

## Sect. 60.

**M**ES si home lessa terres ou tenements per fait ou sans fait (7) a terme des ans, le remainder ouster a un autre pur terme de vie, ou en taile, ou en fee; dunque en tiel case il covient, que le lessor fait un liverie de seisin a le lessee pur terme des ans, ou autrement riens passa a eux en le remainder, coment que le lessee enter en les tenements. Et si le termor en tiel case entra devant aucun liverie de seisin fait a luy, dunque est le franktenement et auxy le reversion en le lessor. Mes si il fait liverie de seisin a le lessee, dunque est le franktenement ove le fee a eux en le remainder, selonque le forme del grant et le volunt del lessor.

**B**UT if a man letteth lands or tenements by deed or without deed for terme of yeares, the remainder over to another for life, or in taile, or in fee; in this case it behooveth, that the lessor maketh livery of seisin to the lessee for yeares, otherwise nothing passeth to them in the remainder, although that the lessee enter into the tenements. And if the termour in this case entreth before any livery of seisin made to him, then is the freehold and also the reversion in the lessor. But if he maketh liverie of seisin to the lessee, then is the freehold together with the fee to them in the remainder, according to the forme of the grant and the will of the lessor.

**"PER fait ou sauns fait."** For seeing that the remainders take effect by livery, there needes no deed (8).

22 H. 6. 1.  
10 E. 4. 1.  
18 E. 4. 12.  
(Plow. 25. a.)  
(Post. 143. a.)  
Vaugh. 206.

**"Le remainder"** is a residue of an estate in land depending upon a particular estate, and created together with the same, and in law *Latine* it is called *remanere* (9).

**"Fait un liverie de seisin al lessee."** This livery is not necessary in this case for the lessee himselfe, because he hath but a terme for yeares, but it is for the benefit of them in the rem', so as the livery

(3) Ante. 9. a.

(4) [See Note 320.]

(5) Rot. 74. Hal. MSS.

(6) [See Note 321.]

(7) *Un pur*, L. and M.

(8) 12 H. 4. 20. Hal. MSS.

(9) Sect. 215. Hal. MSS.

to the lessee shall enure for the benefit of them in the rem': for the livery of the possession could not be made to the next in remainder, because the possession belonged to the lessee for [49. b.] yeares; and for that the particular terme and all the remainders made in law but one estate, and take effect at one time, therefore the livery is to be made to the lessee. But if a lease for yeares without deed be made to *A.* and *B.* the remainder to *C.* in fee, and livery is made to *A.* in the absence of *B.* in the name of both; it seemeth the livery is good to vest the remainder; and there is a diversity between two joynt attornies to receive livery for another, and livery and seisin is made to one of them in the name of both, this is cleerly void, because they had but a meer and bare authority (1), and they both doe in law make but one attorney, unlesse the warrant be joyntly and severally (2), but the lessee for yeares hath an interest in the land. Againe, if *A.* is to make a feoffment to *B.* and *C.* and their heires without deed, and *A.* makes livery to *B.* in the absence of *C.* in the name of both, and to their heires; this livery is void to *C.* because a man being absent cannot take a freehold by a livery, but by his attorney being lawfully authorised to receive livery by deed, unlesse the feoffment be made by deed, and then the livery to one in the name of both is good (4).

Note, there is a diversity between livery of seisin of land, and the delivery of a deed; for if a man deliver a deed without saying of any thing, it is a good delivery, but to a livery of seisin of land words are necessary; as taking in his hand the deed, and the ring of the doore (if it be of an house) or a turffe or twigge (if it be of land) and the feoffee laying his hand on it, the feoffor say to the feoffee, Here I deliver to you seisin of this house, or of this land, in the name of all the land contained in this deed, according to the forme and effect of the deed (as hath been said); and if it be without deed, then the words may be, Here I deliver you seisin of this house or land, &c. to have and to hold to you for life, or to you and the heires of your body, or to you and your heires for ever, as the case shall require.

When the kinsman of *Eliemelech* gave unto *Boas* the parcell of land that was *Eliemelech's*, he tooke off his shoe, and gave it unto *Boas* in the name of seisin of the land (after the manner in *Israel*) in the presence and with the testimony of many witnesses. And when *Ephron* infeoffed *Abraham* of the field of *Machpelah*, he said to him, *Agrum trado tibi*, &c. I deliver this field to thee.

A man makes a lease for yeares to *A.* the remainder to *B.* in fee, and makes livery to *A.* within the view; this livery is void, for no man can take by force of a livery within the view, but he that taketh the freehold himselfe.

“*Et si le termor en tiel case enter devant ascun livery fait, &c.*”  
By the entry of the lessee he is in actual possession, and then the livery cannot be made to him that is in possession, for *quod semel meum est, amplius meum esse non potest*. But if the lessor and lessee come upon the ground, of purpose for the lessor to make, and for the lessee to take livery, there his entry vests no actual possession in him untill livery

(Post. 143. a.)  
(S. Co. 94. b.)  
10 E. 4. 1.  
12 E. 4. 16.  
15 E. 4. 18.  
22 E. 4. 36.  
40 E. 3. 10.  
41. (3)  
Temps H. 8.  
Feoffments 72.  
6 H. 4. 2. b.  
Litt. 153.  
3 H. 7. 13.  
(Post. 389. a.)  
(Ante 36. a.)  
9 Co. 137.)

Ruth, cap. 4.  
verse 7, 8.  
Deut. 25, 9, 10.

Gen. 23.  
verse 11.

(Mo. 14.)

[49. b.]

(1) See further as to the difference between a naked authority and an authority coupled with an interest, post. 52. b. 113. a. and 181. b.

(2) See post. note 1. in 52. b.

(3) 18 E. 4. 12.—Hal. MSS.

(4) Dy. 14. 35. 18 H. 6. 9. 22 H. 6. 1.—Hal. MSS.

livery be made; for [a] *affectio tua nomen imponit operi tuo* (5). And therefore if it be agreed betweene the disseisor and disseisee, that the disseisee shall release all his right to the disseisor upon the land, and accordingly the disseisee entred into the land, and delivereth the release to the disseisor upon the land, this is a good release, and the entry of the disseisee, being for this purpose, did not avoid the disseisin, for his intent in this case did guide his entry to a speciall purpose. And so was it resolved [b] by sir *James Dyer*, and the whole court of common pleas, *Pasch. 18 Eliz.* upon evidence which I myselfe heard and observed. But if the disseisor enfeoffe the disseisee and others, there albeit the disseisee came to take livery, yet when livery is made, the disseisee is remitted to the whole in judgement of law, as shall be said more at large in the Chapter of Remitter in his proper place.

[a] Bracton, lib. 1.

[b] P. 19 *Eliz.*  
in *Communi*  
*Banc. Pl. Com.*  
in *Ass. de fresh-*  
*foree* 91.  
20 *Ass. 20.*  
43 *Ass. p. 3.*  
3 *H. 6. 19 in*  
*formeden.* (6.)

[50. a.]

Sect. 61.

**E**T si home voile faire feoffment, per fait ou sans fait, de terres ou tenements que il ad en plusieurs villes en un countie, le liverie de seisin fait en un parcel de les tenements en un ville, en le nosme de tous, suffist pur tous les autres terres et tenements comprehendes deins mesme le feoffment en toutz les autres villes deins mesme le countie. Mes si home fait un fait de feoffment des terres ou tenements en divers counties, la il covient en chescun countie aver un liverie de seisin.

**A**ND if a man wil make a feoffment, by deed or without deed, of lands or tenements which he hath in divers townes in one countie, the livery of seisin made in one parcell of the tenements in one towne, in the name of all the rest, is sufficient for all other the lands and tenements comprehended within the same feoffment in al other the townes in the same countie (1). But if a man maketh a deed of feoffment of lands or tenements in divers counties, there it behoveth in every county to have a livery of seisin (2).

**E**N un countie." A countie is fetched from the *French*, and shire from the *Saxon*. For *scyran* in the *Saxon* tongue signifieth *partiri*, because everie countie or shire is divided and parted by certaine metes and bounds from another, and in *Latine* is called *Comitatus*, à *comitando*, for accompanying together. And for as much as the men of one county doe not accompany together with men of another county at countie courts, turnes, leets, and other courts, therefore in judgement of law they shall take no notice of a liverie in another countie to passe any lands in their owne countie. But of this more shall be said hereafter.

(Post. 253. a.)  
(3 Co. 31. b.)  
(Post. 166. a.)

43 E. 2. 21.

(5) [See Note 322.]

(6) 9 H. 7. 1. 41 E. 3. 17. Hal.

MSS.

[50. a.]

(1) [See Note 323.]

(2) [See Note 324.]

Sect.

## Sect. 62.

**E**T en ascun cas home avera per le grant d'un auter fee simple, fee taile, ou franktenement sans livery de seisin. Sicome deux homes sont, et chescun d'eux est seisié d'un quantitie de terre deins un countie, et l'un grant a sa terre a l'auter en eschange pur la terre que l'auter ad, et en mesme le manner l'auter grant a sa terre a le primer grantor en eschange pur la terre que le primer grantor ad ; en ceo cuse chescun poit entrer en l'autre terre, issint mise en eschange, sans ascun livery de seisin ; et tieles exchange fait per parolx de tenements deins mesme le countie sans escript est assés bone.

**A**ND in some case a man shall have by the grant of another a fee simple, fee tail, or freehold without livery of seisin. As if there be two men, and each of them is seised of one quantity of land in one countie, and the one granteth his land to the other in exchange for the land which the other hath, and in like maner the other granteth his land to the first grantor in exchange for the land which the first grantor hath ; in this case each may enter into the other's land, so put in exchange, without any livery of seisin (1) ; and such exchange made by paroll of tenements within the same county without writing is good enough (2).

(4 G. 1. 122.)  
45 F. 3. 21.  
3 E. 4. 10.  
9 E. 4. 21.  
7 H. 4. 1.  
8 H. 7. 4.  
22 H. 6. 2.

**H**ERE Littleton putteth a case where freehold, &c. shall passe without livery of seisin, and thereupon putteth the case of an exchange of lands in one countie that is good by deed or without deed, without any livery, but if it be in severall counties there must be a deed. Also of things that lye in grant, as advowsons, rents, commons, &c. an exchange of them, albeit they be in one countie, is not good, unlesse it be by deed ; and therefore Littleton putteth his case warily of land. And in case of a fine, which is a feoffment of record, of a devise by a last will, of a surrender, of a release or confirmation to a lessee for yeares, or at wil. In all these and some other cases a freehold, &c. (as hath beene said) [50. b.] may passe without livery. But this word (*exchange*) which our author here useth, is so appropriated by law to this case, as it cannot be expressed by any periphrasis or circumlocution (3).

Vide Sect. 1.

"*En ceo case chescun poit enter, &c.*" For by the exchange the parties, albeit the lands be all in one county, have no freehold in deed or law in them before they execute the same by entry ; and therefore if one of them dyeth before the exchange be executed by entrie, the exchange is void ; for the heire cannot enter and take it as a purchasor, because he was named onely to take by way of limitation of estate in course of descent.

9 E. 4. 38, 39.  
45 E. 3. 20, 21.  
45 E. 3.  
Exchange 18.

## Sect. 63.

**E**T si les terres ou tenements soient en divers counties, c'est ascavoir, ceo que l'un ad est en un countie, et ceo que l'auter ad est en auter countie, la

**A**ND if the lands, or tenements be in divers counties, viz. that which the one hath in one county, and that which the other hath in another

(1) [See Note 325.]  
(2) [See Note 326.]

(3) See ass. post. 51. b. and Wils. vol. 2. part. 3. page 491. 496.

*la il covient de aver un fait indent d'estre fait enter eux de tiel exchange.* another county, there it behoveth to have a deed indented made betweene them of this exchange.

**T**HIS is evident enough. But of what things an exchange may be made (which was a conveyance frequent in former times) is to be seene: and herein many things are to be observed. (Hob. 41.)

First, that the things exchanged [a] need not to be *in case* at the time of the exchange made. As if I grant a rent newly created out of my lands in exchange for the manor of *Dale*, this is a good exchange (4).

[a] Secondly, there needeth no transmutation of possession, and therefore a release of a rent, or estovers, or right to land, in exchange for land, is good (5).

The things [c] exchanged need not be of one nature, so they concerne lands or tenements, whereof *Littleton* here speaketh. As land for rent or common, or any other inheritance which concerne lands or tenements, or spirituall things, as tythes, &c. for temporall, and tenure by a divine service for a temporall seigniori, &c. But annuities or such like which charge the person onely, and doe not concerne lands or tenements, cannot be exchanged for lands or tenements.

[a] 30 E. 1.

Kech. 15.

3 E. 4. 10.

9 E. 4. 21.

14 H. 8. 20.

[b] 6 E. 54.

30 E. 1. Kech. 16.

16 E. 3. Kech. 2.

7 H. 4. 34.

3 E. 4. 11.

[c] 9 E. 4. 21.

9 E. 3. 50.

21 E. 3. 6.

## Sect. 64, 65.

**E**T nota, que en eschange il covient, que les estates soient egales, que ambideux tiels parties avoront en les terres issint eschanges; car si l'un velloit et grant que l'auter averoit la terre en fee taile pur le terre que il averoit del grant de le auter en fee simple, coment que l'auter soit agree a oel, cest exchange est voide, pur ceo que les estates ne sont my egales.

**E**N meisme le manner est, lou il est grant et agree enter eux, que l'un avera en l'un terre fee taile, et l'auter en l'auter terre forsque a terme de vie; ou si l'un avera en l'un terre fee taile generall, et l'auter en l'auter terre fee taile especial, &c. Issint tous foits il covient que en eschange les estates d'ambideux parties soient egales, c'est ascavoir, si l'un ad fee simple en l'un terre, que l'auter avera tiel estate en l'auter terre; et si l'un ad fee taile en l'un terre, il covient que

**A**ND note, that in exchanges it behooveth, that the estates which both parties have in the lands so exchanged, be equall; for if the one willeth and grant that the other shall have his land in fee taile for the land which he hath of the grant of the other in fee simple, although that the other agree to this, yet this exchange is voyde, because the estates be not equall.

**I**N the same manner it is, where it is granted and agreed betweene them, that the one shall have in the one land fee taile, and the other in the other land but for terme of life; or if the one shall have in the one land fee taile generall, and the other in the other land fee taile especial, &c. So alwaies it behoveth that in exchange the estates of both parties be equall, viz. if the one hath a fee simple in the one land, that the other shall have like estate in the other land;

(4) [See Note 327.]

(5) See as to this Fulb. Paral. 33. a. in the dialogue on exchanges.

*que l'auter avera semblable estate en l'auter terre, &c. et sic de aliis statibus. Mes n'est my riens a charger del egal value des terres; car coment que la terre l'un vault mult plus que la terre de l'auter, ceo n'est riens a purpose, issint que les estates per l'eschange fait soient egales. Et issint en l'eschange sont deux grants, car chescun partie grant son terre a l'auter en eschange, &c. et en chescun de lour grants mention serra fayt de l'eschange.*

land; and if the one hath fee taile in the one land, the other ought to have the like estate in the other land, &c. and so of other estates. But it is nothing to charge of the equal value of the lands; for albeit that the land of the one be of a farre greater value then the land of the other, this is nothing to the purpose, so as the estates made by the exchange be equall. And so in an exchange there be two grants, for each party granteth his land to the other in exchange, &c. and in each of their grants mention shall be made of the exchange.

*Estates. Vid.*  
*Sect. 69.*

**E***N eschange il covient que les estates soient egales, &c.* "Equality in lands is threefold, viz. First, equality in value: Secondly, equality in quantity of estate given and taken. Thirdly, equality in quality or manner of the es- [51. a.]

tate given and taken. But as *Littleton* after saith, equality in value of lands in exchange is not requisite; neither equality in the quality or manner of the estate. And therefore if two jointenants give lands jointly to two men and their heires, and the other in exchange of other lands to them and their heires in common, this is a good exchange (1); and yet the manner of their estates is not equall, for the estate of one party is joynt, and the other in common. And so it is if two men give lands in exchange to *A.* and his heires for lands from *A.* to them two and their heires, though the one party have a joynt estate, and the other a sole estate, yet the exchange is good. The like is if the one land be of a defeasible title, and the other of an undefeasible title, yet the exchange is good till it be avoyded.

[a] An exchange with the king is good, and yet the king is seised in his politike capacity, and the subject in his naturall capacity (2). But equality of the quantity of the estate is requisite, as it appeareth clearly in the cases put by *Littleton*. [b] But therein it is to be observed, that it is not necessary that the parties to the exchange be seised of an equall estate at the time of the exchange made: for if tenant in taile, or a husband seised in the right of his wife, exchange lands, and both by the exchange give a fee simple, this is good untill it be avoyded by the issue in tail, or (1. Ro. Abr. 811.) by the wife after the death of the husband; [d] so as *Littleton* saith, that in exchanges it behoveth that the estates which both parties have in the land so exchanged be equal, is as much as to say that the state reciprocally given in exchange ought to be equall.

[c] But in a partition the estates allotted to either party need not to be equall, as shall be observed in his proper place. [51. b.]

To shut up this point, there be five things necessary to the perfection of an exchange. 1. That the estates given be equall (1). 2. That

[e] *Bracton*, lib. 1. fo. 309.  
17 E. 3. 13. b.  
4 H. 4. 2.

[f] 14 H. 6.  
6 E. 2. Exch. 13.  
8 E. 3. Cui in vita 38.

10 E. 2. Exch. 13.  
16 E. 3. Exch. 2.  
3 E. 3. 19.

12 H. 4. 13.  
21 H. 6. 24.  
33 E. 4. 3. (3)

[d] 44 E. 3. 20.  
38 E. 3. 15.  
30 E. 3. 1.

9 E. 4. 31.  
7 H. 4. 17.  
30 E. 1. tit. Bro. 884.

30 E. 1. tit. Exchange 15.  
[e] F. N. B. 68. m.  
(Post. 172. b.)

(1) [See Note 328.]  
(2) [See Note 329.]  
(3) 45 E. 3. 20. Hal. MSS.

[51. b.]  
(1) (Vid. 22 E. 3. 3. Contra 38 E. 3. 15. Hal. MSS.)

2. That this word (*excambium* exchanged) be used, [*f*] which is so individually requisite, as it cannot be supplied by any other word or described by any circumlocution (2): and herewith agreeth *Littleton* afterwards in this Section. In the booke of *Domesday* I finde, *Hanc terram cambiavit Hugo Briccuius quod modò tenet comes Meriton, et ipsum scambium valet duplum.*

*Hugo de Belcamp pro escambio de Warres.*

3. That there be an execution by entry or claime in the life of the parties, as hath bin said. [*g*] 4. That if it be of things that lye in grant, it must be by deed. [*h*] 5. If the lands be in severall counties, there ought to be a deed indented, or if the thing lye in grant, albeit they be in one county.

[*i*] If an infant exchange lands, and after his full age occupy the lands taken in exchange, the exchange is become perfect, for the exchange at the first was not void (because it amounted to a livery, and also in respect of the recompence) but voidable (3).

"*Coment que l'auter agree a cel, cest exchange est voidé.*" The agreement of the parties cannot make that good which the law maketh void.

## Sect. 66.

**I**TEM, si home lessa terre a un auter pur terme d'ans, coment que le lessor morust devant que le lessee enter en les tenements, uncore il poit enter en mesmes les tenements apres le mort le lessour, pur ceo que le lessee per force de le lease ad droit maintenant d'aver les tenements solonque le forme de le lease. Mes si home fait un fait de feoffement a un auter, et un letter d'attorney a un home a deliverer a luy seisin per force de mesme le fait; uncore si liverie de seisin ne soit fait en la vie celui que fesoit le fait, ceo ne vaulit riens, pur ceo que l'auter n'ad pas ascun droit d'aver les tenements solonque le purport de le dit fait, devant le liverie de seisin; et si nul liverie de seisin soit fait, donque apres le mort celui que fist le fait, le droit de tiels tenements est maintenant en son heire, ou en ascun auter.

**A**LSO, if a man letteth land to another for term of yeares, albeit the lessor dieth before the lessee entreth into the tenements, yet he may enter into the same tenements after the death of the lessor, because the lessee by force of the lease hath right presently to have the tenements according to the forme of the lease. But if a man maketh a deed of feoffment to another, and a letter of attorney to one to deliver to him seisin by force of the same deed; yet if livery of seisin be not executed in the life of him which made the deed, this availeth nothing, for that the other had nought to have the tenements according to the purport of the said deed, before livery of seisin made; and if there be no livery of seisin, then after the decease of him who made the deed, the right of these tenements is forthwith in his heire, or in some other.

"**S**I home lessa terre a un auter pur terme d'ans, coment que le lessor morust devant, &c." The reason is, because the interest of the terme (as hath beene said) doth passe and vest in the lessee before entry, and therefore the death of the lessor cannot devest that which was vested before.

"Attorney"

(2) [See Note 330.]

(3) [See Note 331.]

(Post. 270. a.)

[*f*] 9 E. 4. 21.  
25 H. 6. 50.  
10 H. 6. 27.  
44 E. 3. 24.  
20. Ann. Domest.  
Wadon. Boff.  
Sandrin.  
9 E. 4. 29.  
15 E. 4. 3.  
45 E. 3. 30.  
45 E. 3.  
Exchange 1.  
(4. Co. 131.)  
[*g*] 20 H. 6. 2.  
[*h*] 45 E. 3. 20.  
9 H. 4. 11.

[*i*] 4 E. 2. 2k.  
Exch. 10.  
12 H. 4. 12.

(P. Co. 74.  
F. N. B. 104.)

"Attorney" is an ancient *English* word, and signifieth one that is set in the turne, stead, or place of another: and of these some be private (whereof our author here speaketh) and some be publike, as attorneys at law, whose warrant from his master is, *pouit loco suo talem attorneyatum suum*, which setteth in his turne or place such a man to be his attorney.

Vid. Sect. 196.

"*Et un letter d'attorney a un home a deliverer a luyerin per force de meisme la fui.*" Here first it appeareth that the [52. a.] authority to deliver seisin (as hath bin said) must be by deed (1): for *letter d'attorney* is as much as a warrant of attorney by deed, for *littere* doe signifie sometime a deed, as *littere acquitancie* doe signifie a deed of acquittance, and herewith [a] agreeth *Britton*.

(c) 24 E. 3. 27.  
11 H. 7. 13.  
Britt. 101. b.  
(5) 21 E. 4. 18.  
Br. Roflements  
50. 21 H. 6. 20.  
13 E. 3.  
Attorney 73.

2. *Littleton* here speakes generally *a un home*, and few persons are [b] disabled to be private attorneyes to deliver seisin; for mounks, infants, fem covertes (2), persons attainted, outlawed, excommunicated, villeins, aliens, &c. may be attorneyes. A fem may be an attorney to deliver seisin to her husband, and the husband to the wife, and he in the remainder to the lessee for life.

(c) 18. Ass. pl. 26.  
26. Ass. 30.  
11 H. 4. 3.  
10 H. 7.  
11 H. 7. 13.  
40. Ass. 33.  
(9. Co. 76. b.)  
27. Ass. 61.  
41. Ass. 10.  
41 E. 2. 17.  
(2. Leon. 73.)

3. It appeareth here that the attorney must [c] pursue his warrant, otherwise he doth not deliver seisin by force of the deed, as *Littleton* speaketh. Now his authority is twofold, expressed in his warrant, and implied in law, both which he must pursue. And first of his expresse authority. A man seised of *Black Acre* and *White Acre* makes a deed of feoffment of both, and a letter of attorney to enter into both *Acres*, and to deliver seisin of both of them according to the forme and effect of the deed, and he entreth into *Black Acre* and delivers seisin *secundum formam carte*, this livery and seisin is good, albeit he did not enter into both, nor into one in the name of both; for when he delivereth seisin of one *secundum formam carte*, this is *tantamount* and implyeth a livery of both. So when the feoffment is made to two or more, and the attorney is to make livery of seisin to both, and the attorney make livery of seisin to one of the feoffees *secundum formam et effectum carte*, this is good to both, and yet in that case he that is absent may waive the livery (3). If lessee for life make a deed of feoffment and a letter of attorney to the lessor to make livery, and the lessor maketh livery accordingly, notwithstanding he shall enter for the forfeiture. But if lessee for yeares make a feoffment in fee and a letter of attorney to the lessor to make livery, and he make livery accordingly, this livery shall binde the lessor, and shall not be avoyded by him: for the lessor cannot make livery as attorney to the lessee, because he had no freehold whereof to make livery, but the freehold was in the lessor (4). If the lessor make a deed of feoffment and a letter of attorney to the lessee for yeares to make livery, and he doth it accordingly, this shall not drowne or extinguish his tearme, because he did it as a minister to another (5) and in another's right, and is accounted in judgement of law the act of the other, and the feoffee claimeth nothing by him (7).

(Post. 316. a.  
359. c.)

Ts. 7 Elix. in  
com. banco (S).  
(Mo. 11. Cro.  
Jo. 177.)

17 E. 2. 61.  
(F. N. B. 35. O.)

If one as procurator or attorney to another present to his owne benefice, he puts himselfe out of possession, because he commeth in by the

(1) Vid. 1. Ass. 16. 26. Ass. 29. 35. Ass. 1.  
12 H. 7. 27. 13. H. 7. 14. 4 H. 7. 13. 13 E.

4. 8. Hal. MSS.

(2) [See Note 332.]

(3) [See Note 333.]

(4) [See Note 334.]

(5) *Smith's case*. Hal. MSS.

(6) [See Note 335.]

(7) [See Note 336.]



the induction and institution of the ordinary. If the tenant devise that the lord shall sell the land, and dieth, and the lord selleth it, the seigniori remaines. But if the lord or a grantee of a rent charge had been also *cestuy que use* of the land, and after the statute of R. 3. and before the statute of 27 H. 8. *cestuy que use* had made a feoffment in fee of the land, albeit the land passeth from the feoffees, and his feoffment is warranted by the power given to him by the statute, yet the seigniori or rent charge is extinct by his feoffment, for that he hath not a bare authority as the attorney hath (8).

(1. Co. 111.  
Post. 206. b.)

If a man be disseised of *Blacke Acre* and *White Acre*, and a warrant of attorney is made to enter into both and to make livery, there if the attorney enter into *Blacke Acre* onely and makes livery *secundum formam carte*, there the livery of seisin is void, because he doth lease

(Post. 202. b.)

[52. b.] then his warrant (9); for the estate of the disseisor in *White Acre* cannot be devested without an entry. But there is a diversity betweene an authority coupled with an interest, and a bare authority (1). For example, a custome within a mannor time out of mind of man used, was to grant certaine lands parcell of the said mannor in fee simple, and never any grant was made to any, and the heires of his body, for life or for yeares; and the lord of the said mannor did grant to one by copie for life, the remainder over to another, and the heires of his body; and it was [k] adjudged, that the grant and remainder over was good; for the lord having authoritie by custome, and an interest withall, might grant any lesser estate: for in this case, the custome that enableth him to the greater, enableth him to the lesser, *Omne majus in se continet minus*. But he that hath but a bare authority, as he that hath a warrant of attorney, must pursue his authority (as hath beene said), and if he doe lesse, it it voyd (2).

(1. Ro. Abr. 511.)  
[A] Hil. 30. EL.  
Rot. 492. inter  
Stanton &  
Barnes, in  
ejectione firmæ,  
in the King's  
Bench.  
Post. 205. b.  
1. Sid. 6.)  
3 k s Ph. & M.  
Dyer 151.  
17 EL Dyer 40.  
(Mo. 91. 2. 622.  
65. 2. Leon. 19.  
(Ante 46. b.)

A man make a lease for life, and after make a charter of feoffment, with a letter of attorney to deliver seisin, the attorney enters upon the lessee, this is sufficient to convey away the reversion; for (3) (that it may be said once for all) livery of seisin being to perfect the common assurance of lands, is alwayes expounded favourably, *ut res magis valeat quam pereat*. And all this was adjudged and [l] resolved by the court of common pleas, and after affirmed by all the judges of the king's bench, in a writ of error.

And it is to be knowne, that a deed of feoffment beginning *Omibus Christi fidelibus, &c.* or *Sciatis presentes et futuri, &c.* or the like, a letter of attorney may be contained in such a deed; for one continent may containe divers deeds to severall persons; but if it be by indenture between the feoffor on the one part, and the feoffee on the other part, \* there a letter of attorney in such a deed is not good, unless the attorney be made a party in the deed indented (4).

Now the authoritie of an attorney implied in the law, is, though the warrant be generall, to deliver seisin; yet the attorney cannot deliver seisin within the view, for his warrant is intendable in law of an actuall and expresse liverie and not of a liverie in law, and so hath it been resolved (5). See more hereof here next following.

"Uncore

(8) See *supra* note 7.

(9) [See Note 337.]

[52. b.]

(1) See ante 49. b. and post. 115. a. and 181. b.

(2) [See Note 338.]

(3) [See Note 339.]

(4) *Adjudged contra between Diobert and Noland*. Hal. MSS.—See also another case *contra* in Cro. Eliz. 905. The case cited by lord Hale is in 2. Ro. Abr. 8. pl. 12.

(5) Dy. 233. *Sir Walter Demy's case*. Hal. MSS.

[7] Pasc. 31 EL.  
Rot. 514. in  
Com. Banc.  
inter Carter pl.  
& Claypole &  
al. def. In  
ejectione firmæ,  
& in briefe de  
error. Hil.  
32 EL Rot. 791.  
\* Communis  
error fect jus  
(ut dicitur) in  
contributione.  
2. Inst. 675.  
2. Ro. Abr. 8.  
Cro. Eliz. 905.)  
Pasc. 3 EL. in  
Com. Banc. in  
Yarham's case.

23 H. 6. 4.

"*Uncore si liverie et seisin ne soit fait en la vie celui que fesoit le fait.*" Here albeit the warrant of attorney be indefinite, without limitation of any time, yet the law prescribeth a time, as *Littleton* here saith, in the life of him that made the deed; but the death not only of the feoffor, of whom *Littleton* speaketh, but of the feoffee also, is a countermand in law of the letter of attorney, and the deed it selfe is become of none effect, because in this case nothing doth passe before livery of seisin. For if the feoffor dieth, the land descends to his heire, and if the feoffee dieth, liverie cannot be made to his heire, because then he should take by purchase, where heires were named by way of limitation (6.) And herewith agreeth *Bracton*, *Item oportet quod donationem sequatur rei traditio, etiam in vita donatoris et donatorij*. Therefore a letter of attorney to deliver livery of seisin after the decease of the feoffor is voyd (7).

*Bracton*, li. 2.  
fo. 16.  
40. Am. pl. 38.  
20 H. 6. 7. a.  
14 E. 4. 2.  
18 E. 3. 16. b.  
11 H. 7. 13, &c.  
18 H. 8. 2.  
11 H. 7. 19.  
(1. Sid. 162.)

Fourthly, in all cases the attorney must pursue the warrant in substance and effect that he hath to deliver seisin.

Fiftly, all this is to be understood of sole persons, or of a corporation or body consisting of one sole person, or a bishop, parson, &c. But it holdeth not in a corporation aggregate of many persons capable (8). And therefore if a maior and commonalty make a charter of feoffement, and a letter of attorney to deliver seisin, the livery of seisin is good after the decease of the maior, because the corporation never dieth (9). The like of a deane and chapter, *et sic de similibus*.

(4. Co. 119. b.  
Cro. Ja. 103.  
4. Co. 39.)  
*Mich. 3. Ja. in*  
*Com. Banc.*  
*F. N. B. 213.*  
*3 E. 3. off. de*  
*Court. 30.*  
*Stamf. Prior. 30.*  
*(1. Ro. Abr.*  
*331, 332.)*

Lastly, if the lessor by his deed license the lessee for life or yeares (which is restrained by condition not to alien without licence) to alien, and the lessor dieth before the lessee doth alien, yet is his death no countermand of the licence, but that he may alien, for the licence exempteth the lessee out of the penaltie of the condition, and it was executed on the part of the lessor as much as might be. And so it was resolved, *Michael. 3. Jacob. in Communi Banco*. As if the king doth license to alien in mortmaine, and dyeth, the licence may be executed after (10).

## Sect. 67.

**I**TEM, si tenements soient lesses a un home pur terme de demy an, ou per le quarter de un an, &c. en tiel case, si le lessee fait wast, le lessor avera envers luy briefe de wast, et le briefe dirra, quod tenet ad terminum annorum; mes il avera un speciall declaration sur le veritie de son matter, et le count n'abatera le briefe, pur ceo que il puit aver nul autre briefe sur le matter.

**A**LSO, if tenements be let to a man for terme of halfe a yeare, or for a quarter of a yeare, &c. in this case, if the lessee commit wast, the lessor shall have a writ of waste against him, and the writ shall say, *quod tenet ad terminum annorum*; but he shall have an especiall declaration upon the truth of his matter, and the count shall not abate the writ, because he cannot have any other writ upon the matter.

"SI

(6) [See Note 340.]

(7) [See Note 341.]

(8) 11 H. 7. 27. 12 H. 8. 12. 5 H. 7. 25.  
21 H. 7. 1. Hal. MSS.

(9) [See Note 342.]

(10) Vid. *Plowd. Com. 457. contra in licencas*  
to the tenant to alien, ut videtur. Hal. MSS.

"*SI le lessee fait wast.*" Waste, *Vastum, dicitur à vastando*, of wasting and depopulating: and for that waste is often alleged to be in timber, which we call in *Latine marcium*, or *marcenium*, or *marcenium*, it is good to fetch both of them from the original. First, *timber* is a *Saxon* word. Secondly, *marcenium* is derived of the *French* word *marreim*, or *marrein*, which properly signifieth timber.

An action of wast doth lie against tenant by the curtesie, tenant in dower, tenant for life, for yeares, or halfe a yeare, or gardian in chivalry (1), by him that hath the immediate estate of inheritance, for wast or destruction in houses, gardens, woods, trees, or in lands (2), meadows, &c. or in exile of men to the disherison of him in the reversion or remainder. There be two kinds of waste, viz. voluntary or actual, and permissive. [a] Wast may be done in houses, by pulling or prostrating them down, or by suffering the same to be uncovered, whereby the spars or rafters, plaunchers, or other timber of the house are rotten (3). [b] But if the house be uncovered when the tenant commeth in, it is no wast in the tenant to suffer the same to fall downe. But though the house be ruinous at the tenant's coming in, yet if he pull it downe, it is wast unlesse he reedifie it againe (4). [c] Also if glasse windowes (tho' glazed by the tenant himselfe) be broken downe, or carried away, it is wast, for the glasse is part of his house. And so it is of wainscot (5), benches, doores windowes, furnaces, and the like, annexed or fixed to the house, either by him in the reversion, or the tenant.

[d] Though there be no timber growing upon the ground, yet the tenant at his perill must keepe the houses from wasting. If the tenant doe or suffer waste to be done in houses, yet if he repaire them before any action brought, there lieth no action of wast against him, but he cannot plead, *quod non fecit vastum*, but the speciall matter.

A wall uncovered when the tenant commeth in, is no wast if it be suffered to decay. [e] If the tenant cut downe or destroy any fruit trees growing in the garden or orchard, it is waste; but if such trees grow upon any of the ground which the tenant holdeth out of the garden or orchard, it is no waste (6).

[f] If the tenant build a new house, it is waste, and if he suffer it to be wasted, it is a new waste. [g] If the house fall downe by tempest, or be burnt by lightning, or prostrated by enemies, or the like, without a default of the tenant, or was ruinous at his coming in, and fall downe, the tenant may build the same againe with such materials as remaines, and with other timber which he may take growing on the ground for his habitation, but he must not make the house larger then it was. If the house be discovered by tempest, the tenant must in convenient time repaire it (7).

[h] If the tenant of a dove house, warren, parke, vivary, estanges, or the like, do take so many, as such sufficient store be not left

(F. N. B. Waste 55. Post. 345.)

V. Marib. ca. 23. 2. part of the Instit. (F. N. B. 45.)

[a] 34 E. 3. Wast. 143. (4 Co. 63. Mo. 54. 2. Ro. Abr. 819.)

[b] 40. Am. p. 32. 3 Mar. Dyer 117. 23 H. 6. 24. 10 H. 7. 2. 44 E. 3. 44. 39 E. 3. 33. 4 Co. 63. Herlakenden's case. [c] 23 H. 6. 18. 13 H. 8. 1. 13 H. 7. 31. 32 E. 4. 18.

21 E. 4. 39. 10 H. 7. 2. Reg. Judic. 96.

[d] 44 E. 3. 31. 38. Am. 1. 4 E. 3. Wast. 22. 10 El. Dyer 276. 5 Co. 119. in Whelpdale's case 19 E. 3. Wast. 30. 44 E. 3. 44.

[e] 7 H. 6. 38. 44 E. 3. 44.

[f] 49 E. 3. 81. 49 E. 3. 2. 9 H. 6. 52. 17 E. 2. Wast. 118. (Hob. 234. 2. Ro. Abr. 814. 815. 820. 1. Ro. Abr. 807. cont. Mo. 7.) [g] 4 Co. 63. Herlakenden's case. 43 E. 3. 6. 26 E. 3. 76. 11 H. 4. 32. 19 E. 3. Wast. 36.

[h] Tempe E. 1. Wast. 128. Brit. 10. 34. 8 R. 2. Wast. 97. (2. Ro. Abr. 814.

12 H. 8. 1. Pl. Com. 332. 7 H. 3. Wast. 141.

(1) Some of these were not punishable at common law. See post. 53. b. and 54. a.

(2) [See Note 343.]

(3) [See Note 344.]

(4) [See Note 345.]

(5) [See Note 346.]

(6) 14 H. 4. 12. Hal. MSS.

(7) [See Note 347.]

as he found when he came in, this is wast; and to suffer the pale to decay, whereby the deere is dispersed, is waste (8).

And it is to be observed, that there is wast, destruction and exile. Wast properly is in houses, gardens, (as is aforesaid) in timber trees, (viz. oak, ash, and elme, and these be timber trees in all places) either by cutting of them downe, or topping of them, or doing any act whereby the timber may decay. Also in countries where timber is scant, and beeches or the like are converted to building for the habitation of man, or the like, they are all accounted timber. [i] If the tenant cut down timber trees, or such as are accounted timber (10), as is aforesaid, this is wast; and if he suffer the young germins to be destroyed, this is destruction. [k] So it is, if the tenant cut down underwood, (as he may by law) yet if he suffer the young germins to be destroyed, or if he stub up the same, this is destruction.

[l] Cutting down of willowes, beech, birch, aspe, maple, or the like, standing in the defence and safeguard of the house, is destruction.

[m] If there be a quickset fence of white thorne, if the tenant stub it up, or suffer it to be destroyed, this is destruction (11); and for all these and the like destructions an action of wast lyeth. [n] The cutting of dead wood, that is, *ubi arbores sunt arida, mortuae, cave, non existentes marcium, nec portantes fructus, nec folia in estate*, is no wast; but turning of trees to coles for fewel, when there is sufficient dead wood, is wast. [53.b.]

[j] 22 H. 6.  
12. a.  
9 H. 6. 1. 66.  
11 A. 6. 1.  
F. N. B. 59. m.  
[k] 30 E. 3.  
Wast. 32.  
10 H. 7. 2.  
42 E. 3. 6. b.  
5 E. 4. 100.  
41 E. 3.  
Wast. 82.  
20 E. 3.  
Wast. 32.  
12 E. 4. 1. (9)  
[l] 40 E. 3.  
15. b. & 38.  
12 E. 4. 1.  
12 H. 8. 1. b.  
10 H. 7. 2.  
8. E. 2.  
Wast. 111.  
4 E. 6.  
Wast. Br. 136.  
(Cro. Ja. 126.  
4. Co. 63. 64.  
1. Ro. Abr. 509.)  
[m] 46 E. 3. 17.  
9 H. 6. 10.  
12 H. 8. 1.  
[n] 16 El. Dy. 339. 30 E. 3. Wast. 32. F. N. B. 59. m.

[o] 44 E. 3. 44.  
20 E. 3.  
Wast. 32.  
F. N. B. 59. b.  
19 E. 3.  
Wast. 30.  
[p] 22 H. 6.  
18. b.  
9 E. 4. 38.  
41 E. 3.  
Wast. 82.  
17 E. 3. 7.  
9 H. 6. 66. 2 H. 7. 24. F. N. B. 59. n. & 149. c. 30 E. 3. Wast. 32. (2. Ro. Ab. 816, 816.)

[o] If the tenant suffer the houses to be wasted, and then fell down timber to repair the same, this is a double wast. [p] Digging for gravel, lime, clay, brick, earth, stone, or the like, or for mines of mettall, coale, or the like, hidden in the earth, and were not open when the tenant came in, is wast; but the tenant may dig for gravell or clay for the reparation of the house, as well as he may take convenient timber trees (1).

[q] Anno 6 El.  
Of the report of  
justice Dalison in  
Griffin's case.  
17 E. 3. 65.  
Brit. fol. 168. b.  
(Mo. 62. 69.)  
[r] 20 H. 6. 1.  
F. N. B. 59. n.  
6 El. ubi supra.  
[s] 28 H. 8.  
Dyer 37.  
22 H. 6. 24.  
10 H. 7. 5. a.  
44 E. 3. 44.  
(2. Ro. Ab. 814.  
Cro. Ja. 182.)  
[t] 16 El. Dy. 332.  
21 H. 6. 41.  
5 E. 4. 100.  
12 E. 3. Wast. 28.  
48 E. 3. 35.  
Temps E. 1. 134.  
20 E. 3. Wast. 32. 19 E. 3. Wast. 30. (Cro. Ja. 292.)

[q] It is wast to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea, the meadow or marsh is surrounded, whereby the same becomes unprofitable; but if it be surrounded suddenly by the rage or violence of the sea, occasioned by winde, tempest, or the like, without any default in the tenant, [r] this is no wast punishable (2). So it is, if the tenant repaire not the bankes or walls against rivers, or other waters, whereby the meadows or marshes be surrounded, and become rushy and unprofitable (3).

[s] If the tenant convert arable land into wood, or *à converso*, or meadow into arable, it is waste, for it changeth not onely the course of his husbandry, but the proove of his evidence.

[t] The tenant may take sufficient wood to repaire the walls, pales,

(8) [See Note 348.]

(9) 7 H. 6. 38. Dy. 35. Hal. MSS.

(10) [See Note 349.]

(11) [See Note 350.]

[53. b.]

(1) [See Note 351.]

(2) See Call. on Sew. 2d ed. 146.

(3) [See Note 352.]

pales, fences, hedges, and ditches, as he found them; but he can make no new (4): and he may take also sufficient plowbote, firebote, and other housbote.

The tenant cutteth downe trees for reparations and selleth them, and after buyeth them againe, and imployes them about necessary reparations, yet it is wast by the vendition: he cannot sell trees, and with the money cover the house; burning of the house by negligence or mischance is waste (5).

[u] If a man make a lease for life, and by deed grant that if any waste or destruction be done, that it shall be redressed by neighbours, and not by suit or plea, notwithstanding an action of wast shall lye, for the place wasted cannot be recovered without a plea.

[x] Bracton, Fleta, and Britton doe use the same division as is aforesaid, viz. *vastum, destructio, et exilium*, in their proper significacion.

New somewhat is to be spoken of exile or destruction of men: exile or destruction of villaines, or tenants at will, or making them poore, where they were rich when the tenant came in, whereby they depart from their tenures, is wast. [a] And yet the statute of Glouc' speaketh not of exile, but it is comprehended under the general word of wast. The statute of W. 1. hath *destructionem*, the statute of Magna Charta hath *vastum et destructionem*, the statute of Merlebridge hath *vastum, venditionem et exilium in domibus, boscis, vel hominibus, &c.*

But wast and destruction in their larger sense are words convertible. [b] *Item de hoc quod dicit vastum et exilium, sciendum est quod non sunt referenda ad eundem intellectum, sed vastum et destructio ferè idem sunt, vastum idem est quod destructio, et è converso, et se habent ad omnem destructionem generaliter.*

[c] *Vastum autem et destructio ferè æquipollent et convertibiliter se habent in domibus, boscis, et gardinis; sed exilium dici poterit, cum servi manumittantur et à tenementis suis injuriose ejiciantur. Fortuna autem et ignis vel hujusmodi eventus inspinati omnes tenentes excusant.*

[d] No person shall have an action of wast, unlesse he hath the immediate state of inheritance, but sometime another shall joyne with him for conformity. As if a reversion be granted to two, and to the heires of one; they two shall joyne in an action of wast: and in like sort the surviving coaparcencer and the tenant by the curtesie shall joyne in an action of waste: and if two joyntenants be, and to the heires of one of them, and they make a lease for life, they shall joyne in an action of waste, (7). [e] If the estate taile determine, hanging the action of waste, and the plt. becomes tenant in taile after possibility, the action of waste is gone. [f] If the tenant doth wast, and he in the reversion dyeth, the heyre shall not have an action of waste for the waste done in the life of the ancestor; nor a bishop, master of an hospitall, parson, or the like, in the time of the predecessor. [g] And

[u] 3 E. 3.  
Wast. 5.  
Bracton, lib. 4.  
fol. 315.

[x] Bracton,  
fol. 168. Fleta,  
lib. 1. cap. 11.  
10 H. 3.  
Wast. 135.  
3 E. 3. tit.  
Wast. 2.  
17 E. 2.  
Wast. 118.  
10 H. 7.  
2 H. 6. 11.  
9 H. 6. 52.  
11 E. 2.  
Wast. 113.  
F. N. B. 56 H.  
& 55. c.  
Regist. judic. 25.  
[a] Glouc. cap.  
5. W. 1 cap. 21.  
Magna Charta  
cap. 4. Merleb.  
cap. 23.  
[b] Bract. lib. 4.  
fol. 316 & 317.  
[c] Fleta, lib. 1.  
cap. 11.  
[d] 7 E. 3.  
54. b.  
2 H. 5. 7.  
22 H. 6. 24.  
13 H. 7.  
27 H. 8. 13.  
F. N. B. 59. f.  
8 R. 2.  
Wast. 147. (6)  
(5. Co. 11.)

[e] 2 H. 4. 22.

[f] 2 H. 4. 2.  
(8)

[g] 10 E. 4. 1.  
49 F. 3. 25.  
23 H. 8. 10.  
Wast. Br.

38 E. 3. 17. 44 E. 3. 8. 45 E. 3. 3. 46 E. 3. 31. 11 E. 2. Wast. 115. 2. Mar. Wast. 117. 8 E. 24  
Wast. 110. (9) (Ant. 42. a.)

(4) See Note 353.]

(5) But now by the 6 Ann. c. 31. no action will lie against the tenant for such an accident. See the statute more fully stated in note 7. ante 53. a. Note also the passage from Fleta cited infra by lord Coke.

(6) 17 E. 3. 50. Hal. MSS.

(7) [See Note 354.]

(8) 21 H. 6. 46. 39 E. 3. 15. 42. F.  
3. 22. Hal. MSS.

(9) 18 E. 4. 16. 10 H. 7. 5. 2 E. 3.  
2. Hal. MSS.

so if lessee for yeares doth waste, and dyeth, an action of wast lyeth not against the executor or administrator for waste done before their time. But if two coparceners be of a reversion and waste is committed, and the one of them die, the aunt and the neece shall joine in an action of waste (10).

[h] If lands be given to two and the heires of one of them, he that hath the fee shall not have an action of waste upon the statute of *Glouc.* for that they are joyntenants, but his heire shall have an action of waste against tenant for life.

Note, after wast done there is a speciall regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done; for if after the waste he granteth it over, though he taketh backe the whole estate again, yet is the wast dispunishable. So if he grant the reversion to the use of himselfe and his wife, and of his heires, yet the wast is dispunishable, and so of the like; because the estate of the reversion continueth not, but is altered, and consequently the action of waste for waste done before (which consists in privity) is gone.

[i] A prohibition of waste did lye against tenant by the curtesie (11), tenant in dower, and a gardian in chivalry, by the common law, but not against tenant for life or yeares, because they came in by their own act, and he might have provided that no wast should be done. [54. a.]

[h] 24 E. 3. 27.  
20 E. 4. 3.  
8 H. 6. 12.  
(Post. 247. b.)  
5. Co. 75.  
2. Ro. Ab. 224.  
Post. 218. b.)

[i] Bract. lib. 4.  
fol. 315, 316.  
317. Fleta, lib. 1.  
cap. 11. Britt.  
fol. 168.  
Duct. and Stud.  
lib. 2. ca. 1.  
12 H. 4. 3.  
10 H. 3.

Wast. 142. 20 H. 6. 1. 4 H. 3. Wast. 140. 9 H. 3. ibid. 136. (10. Co. 116 b.) (2. Inst. 145. Post. 273. 209. b.)  
5. Co. 77. Stat. Glouc. c. 5.)

[i] F. N. B. 56.  
c. et f. Temps  
E. 1. Wast. 128.  
18 E. 3. 3.  
30 E. 3. 10.  
38 E. 3. 23.  
11 H. 4. 18.  
4 E. 3. 26.  
Regist. 72.  
5. Co. 23.  
Walker's case.  
9. Co. 142.  
Beaumont's  
case (1).  
(2. Inst. 303.  
Dr. and Stud.  
lib. 2. c. 1.)  
[k] 27 E. 3. 81.  
20 E. 3.  
Wast. 10. (2)  
[l] 12 H. 4. 3.  
Bract. lib. 4.  
316, 317.  
Fleta, lib. 1.  
c. 11. Britt. 168.  
34 E. 3.  
Wast. 146.  
44 E. 3. 27.  
F. N. B. 50. a. &  
60. g. & T.  
[m] 53 E. 3.  
Wast. 6. (4)

[i] A tenant by the curtesie or in dower can hold of none but of the heire, and his heires by descent, and therefore if they grant over their whole estate, and the grantee doth waste, yet the heire shall have an action of waste against them, and recover the land against the assignee: but if the heire either before the assignment had granted, or after the assignement doth grant the reversion over, the stranger shall have an action of waste against the assignee, because in both cases the privity is destroyed: in all other cases the action of waste shall be brought against him that did the waste (for it is in nature of a trespassse) unless it be in the case of a ward [k]; for there if the gardian doth waste and assigne over, the action lieth against the assignee [l]. A gardian shall not be punished for waste done by a stranger, it is so penall unto him, for he shall lose the wardship both of the body and of the land (3), though the waste be but to the value of twenty shillings; and if that sufficeth not to satisfie for the wast, then he shall recover damages of the waste, over and above the losse of the ward. But tenant by the curtesie, tenant in dower, tenant for life, yeares, &c. shall answer for the waste done by a stranger, and shall take their remedy over. [m] But if there be two joyntenants of a ward, and one of them doe wast, both shall answer for it.

If

(10) [See Note 355.]  
(11) [See Note 356.]

[54. a.]

(1) 7 E. 3. 34. Hal. MSS.

(2) 26 E. 3. Waste 10. is contra. Hal. MSS.

(3) Value of wardship not lost. Vid. Dy. 35. 28 H. 8. Bynll. n. 33. Hal. MSS.

(4) 3 E. 3. 18. Hal. MSS.

[*n*] If the gardian doth waste, and the heire within age bring an action of waste, the gardian shall lose the wardship, as is aforesaid; but if the heire bring an action of waste at his full age, then he shall recover treble damages, for then he cannot lose the wardship.

[*n*] 44 E. 3. 37  
48 E. 3. 10.  
F. N. B. 60. c.  
13 H. 4. 3.  
10 E. 2.  
Wast. 117.  
41 E. 3.  
Wast. 81.

3 E. 2. Wast. 3. 7 E. 3. 12.

[*o*] An infant and baron and fem shall be punished for waste done by a stranger, and so shall the wife that hath the estate by surviour for wast done by the husband in his life time, if she agree to the estate, though there hath beene variety of opinions in our bookes

[*o*] 15 H. 3.  
Wast. 16. temp.  
E. 1. Wast. 123.  
2 H. 4. 3. a.  
3 E. 3. 13. 76.  
11. Ass. 11.  
21 H. 6. 24. b.  
33 H. 6. 31. a.

43 E. 3. 22. 10 E. 3. breve 246. 46 E. 3. 25. 7 H. 6. 2. b. 3 E. 3. 46. 10 E. 3. 17, 18. 9 E. 3. 42. 17 E. 4. 7. 9 H. 6. 62. F. N. B. 36. b. Doct. & Stud. lib. 2. c. 1. 23 H. 6. Wast. 138. 8. Co. 44. Willingham's case.

[*p*] But if a fem tenant for life take husband, and the husband doth waste, and the wife dieth, no action of wast lyeth against the husband in the *tenuit*, for he was seised but *in jure uxoris*, and his wife was tenant of the freehold; but if a fem be possessed of a terme for yeares, and take husband, and the husband doth wast, and the wife dieth, the husband shall be charged in an action of waste, for the law giveth the terme to him.

[*p*] 5. Co. 75.  
Clifton's case.  
40 E. 3. 25.  
46 E. 3. Wast.  
Statham.  
10 H. 6. 11, 12.  
(2. Inst. 301.)

[*q*] If tenant for life grant over his estate upon condition, and the grantee doth wast, and the grantor re-entred for the condition broken, the action of wast shall be brought against the grantee, and the place wasted recovered.

[*q*] 30 E. 3. 16.

[*r*] If a lease for life be made to a villeine, and waste is done, the lord entred, he shall not be punished for the waste done before, but for waste done after, he shall.

[*r*] 48 E. 3. 19.

[*s*] An occupant shall be punished for waste; and so if an estate be made to *A.* and his heires during the life of *B.* *A.* dieth, the heire of *A.* shall be punished in an action of waste.

[*s*] 6. Co. 37.  
le Deane & Chap-  
ter of Worcester's  
case.

[*t*] If a lease be made to *A.* for life, the remainder to *B.* for life, the remainder to *C.* in fee, in this case where it is said in the *Register*, and in *F. N. B.* that an action of wast doth lie, it is to be understood after the death or surrender of *B.* in the meane remainder, for during his life no action of wast doth lie (5).

10. Co. 9. b.  
(2. Ro. Abr. 836.)  
[*t*] 4 E. 3. 18.  
Cote's case.  
3 E. 3. 18.  
F. N. B. 58. c.  
& 59. h.  
50 E. 3. 3.  
33 E. 3.

But if a lease for life be made, the remainder for yeares, the remainder in fee, an action doth lie presently during the terme in remainder, for the meane terme for yeares is no impediment.

Wast. 144.  
11 E. 3.  
resciet 118.  
10 E. 4. 9.  
Regist. 74.

But if a man make a lease for life or yeares, and after granteth the reversion for yeares, the lessor shall have no action of waste during the yeares, for he himself hath granted away the reversion, in respect whereof he is to maintaine his action. [*\**] Otherwise it is, if he had made a lease in reversion, which had been but a future interest; for there an action of wast lieth during the terme, and so is the booke to be understood, and the terme shall be saved in that case.

2. Co. 92. inter  
Paget and Carie in  
Bingham's case.  
5. Co. 76.  
Paget's case.  
10. Co. 44.  
Jenning's case.  
F. N. B. 59. h.  
4 E. 3. 18.  
[*u*] 4 E. 3. 18.  
F. tit. Wast. 18.

[*u*] No action of wast lieth against a gardian in socage, but an account or trespassse, nor against tenant by statute staple, &c. or *elegit* (6).

[*u*] Merlebridge  
cap. 17.  
21 E. 3. 30.  
16 K. 3. tit.  
Wast. 100.

If

14 E. 3. Wast. 107.  
2 E. 2. Wast. 1.

28 H. 6. Wast. 9. 32. H. 6. 7. F. N. B. 59 E.

(5) [See Note 357.]

(6) Vid. *F. N. B.* 54.

Grantee of reversion shall have waste. Hal. MSS.

[w] 12 H. 6.  
cap. 5.  
s. Co. 77.  
Booth's case.

[w] If tenant for life or yeares or their assignee make a grant over, and notwithstanding take the profits, an action of wast lieth against him, by him in the reversion or remainder by the statute. *Nota* (7).

[x] 8 E. 3.  
Wast. 112.  
4 E. 6.  
Wast. 136.  
4 E. 8. 32.  
15 H. 7. 11.  
15 E. 3.  
Wast. 134.  
tempo E. 1.  
Wast. 134.  
18 H. 8. 1. (8)  
[y] Bract. lib. 4.  
§. 316.  
28 E. 3. 7. b.  
34 E. 3.  
Wast. 146.  
24 H. 4. 11. b.  
F. N. B. 60. c.  
tempo E. 1.  
Wast. 134.  
19 H. 6. 8. (11)

[x] If wast be done *sparsim* here and there in woods, the whole woods shall be recovered, or so much wherein the wast *sparsim* is done. And so in houses so many rooms shall be recovered wherein there is wast done; but if wast be done *sparsim* throughout, all shall be recovered. It hath beene said that if the hall be wasted, the whole house shall be recovered, because the whole house is denominated of the hall: but later authority is to the contrary.

[y] There is waste of a small value, as *Bracton* saith, *Nisi vastum ita modicum sit propter quod non sit inquisitio facienda*. Yet trees to the value of three shillings and four pence hath beene adjudged wast, and many things together may make waste to a value (9). But let us now returne to our author (10).

"*Briefe de waste.*" See in the *Register* five severall writs of wast; two at the common law for wast done by tenant in dower, or the gardian; and three by speciall or statute law, for waste done by tenant for life, for yeares, and tenant by the curtesie.

[z] Vid. Bract.  
lib. 5. f. 413. b.  
Fleta, lib. 2.  
cap. 12.  
See the Second  
Part of the Insti-  
tutes.  
W. 2. cap. 24.

"*Briefe dirra.*" The writs originall of the *Register* [z] (as [54. b.] *Bracton* saith) were formed, and of course had their first authority by act of parliament; and therefore without an act of parliament they cannot be altered, or changed, which is proved by the statute of *W. 2. cap. 24.* whereby remedy is provided in many cases. But heare what *Bracton* saith, *Sunt quedam brevia formata in suis casibus, et quedam de cursu, quæ concilio totius regni sunt approbata, quæ quidem mutari non possunt, absque eorundem contrariâ voluntate. Magistralia autem sæpè variantur secundum varietatem casuum, &c.* And this is the reason that in this case of half a yeare the words of the writ shall be without change, *quod tenet ad terminum annorum*, and the pl' must make a speciall declaration according to his case, for otherwise he should be without remedy. In this particular case the statute of *Glouc. cap. 5.* which giveth the action of waste against the lessee for life or yeares (which lay not against them at the common law) speaketh of one that holdeth for tearme of yeares in the plural number; and yet here it appeareth by the authority of *Littleton*, that although it be a penall law, whereby treble damages and the place wasted shall be recovered, yet a tenant for halfe a yeare being within the same mischief, shall be within the same remedie, though it be out of the letter of the law; for *Qui hæret in literâ, hæret in cortice*, which is an excellent example, whereupon in many like cases a man may settle a certaine judgment. You may observe in the said ancient authors, what remedie was given for wast at the common law, and against whom, and what was adjudged waste, destruction, and exile.

De vasto, Bract.  
lib. 4. f. 316, 316.  
317. Fleta, lib. 1.  
c. 11. & lib. 2.  
c. 33. Britton,  
fol. 162 & 168.  
46 E. 3. 31.  
F. N. B. 60. c.  
4 E. 4. 13.  
37 H. 6. 26. b.  
7 H. 7. 2.  
14 H. 8. 12.  
18 E. 3. 27.  
(Dr. & Stud.  
lib. 1. cap. 23.)  
Vide Marlebridge,  
ca. 23.  
2. Part of the In-  
stitutes.

In many cases a tenant for life or yeares may fell down timber to make reparations, albeit he be not compellable thereunto, and shall not be punished for the same in any action of waste. As [a] if a house be ruinous at the time of the lease made, if the lessee suffer the

[a] 12 H. 8. 1.  
(11. Co. 47.  
79. b. Mo. 23.)

(7) *F. N. B.* 59. C. Hal. MSS.  
(8) 3 E. 3. 24. Hal. MSS.  
(9) Vid. Hil. 40 Eliz. C. B. n. 9.  
*Thorne's case.* C. C. Waste to the value of

4d. Hal. MSS.  
(10) [See Note 358.]  
(11) 9 H. 6. 66. Hal. MSS.



house to fall down he is not punishable, for he is not bound by law to repair the house in that case. And yet if he cut down timber upon the ground so letten, and repaire it, he may well justifie it; and the reason is, for that the law doth favour the supportation or maintenance of houses of habitation for mankind. And therefore if two or more joyntenants or tenants in common be of a house of habitation, and the one will not repaire the house, the other shall have by the law a writ of *de reparatione faciendâ*, and the writ saith, *ad sustentationem ejusdem domûs teneantur*. So it is if the lessor by his covenant undertaketh to repaire the houses, yet the lessee (if the lessor doth it not) may with the timber growing upon the ground repair it, though he be not compellable thereunto (1). In the same manner, if a man make a lease of a house and land without impeachment of waste for the house, yet may the lessee with the timber upon the ground repaire the house, though he may utterly waste it if he will; and so in many other cases. A man hath land in which there is a mine of coales, or of the like, and maketh [b] a lease of the land (without mentioning any mines) for life or for yeares, the lessee for such mines as were open at the time of the lease made, may digge and take the profits thereof. [c] But he cannot digge for any new mine, that was not open at the time of the lease made, for that should be adjudged waste. And if there be open mines, and the owner make a lease of the land, with the mines therein, this shall extend to the open mines only, and not to any hidden mine (2): but if there be no open mine, and the lease is made of the land together with all mines therein, there the lessee may digge for mines, and enjoy the benefit thereof, otherwise those words should be void. I have been the more spacious concerning this learning of waste, for that it is most necessary to be knowne of all men (3).

Now hath *Littleton* spoken of an estate for life, and an estate for yeares in severall persons. Now let us see how they stand *simul* and *inmel* in one person.

If a man letteth lands to another for life, the remainder to him for 21 yeares, he hath both estates in him so distinctly, as he may grant away either of them; for a greater estate may uphold a lesser, but not *è converso*; and therefore if a man make a lease to one for 21 yeares, the remainder to him for terme of his life, the lease for yeares is drowned.

[d] If a man make a lease for life to one, the remainder to his executors for 21 yeares, the terme for yeares shall vest in him (4); for even as ancestor and heire are *correlativa* as to inheritance; (as if an estate for life be made to *A.* the remainder to *B.* in taile, the remainder to the right heires of *A.* the fee vesteth in *A.* as it had been limited to him and his heires); even so are the testators and the executors *correlativa* as to any chattell. And therefore if a lease for life be made to the testator, the remainder to his executors for yeares, the chattell shall vest in the lessee himselfe, as well as if it had been limited to him and his executors.

Hill. 42 Eliz. Sir John Savage's case in Curia Wardorum. (2. Ro. Abr. 47. 418. Mo. 100. 332. 666. 2 Leon. 6. Yelr. 85.)

(1) [See Note 359.]

(2) See ante 53. b. and n. 1. there.

(3) See further as to *waste* in the several Abridgments, title *Waste*, and Fulb. 2. part, Paral. Dial. 5. fol. 49. b.

(4) 50 Ass. 1. And per curiam in Sparkes's case adjudged, that it shall go to the administrator. Vide tamen M. 44, 45 Eliz. Moore's Reports, n. 911. contra. Vid. 4. & 5 P. and M. Bend. n. 115. Gravenor's case. Hal. MSS.

F. N. B. fo. 127.

(Hob. 234.)

[b] 17 E. 3. 7.  
9 H. 6. 66.  
12 H. 6. 18.  
9 E. 4. 36.  
12 E. 4. 8.  
F. N. B. 149. q.  
5. 59. b.  
[c] 2. Co. 12.  
Bander's case.  
(1. Co. 46.)

[d] 19 E. 2.  
Covenant 25.  
19 E. 3.  
Covenant 24.  
32 E. 3.  
Quid juris el. 5.  
17 E. 3. 29.  
46 E. 3. 31.  
40 E. 3. 5.  
11 H. 4. 34.  
14 Eliz.  
Dyer 300.  
M. 40. & 41.  
Eliz. in Com.  
Banc. Rot. 2315. in  
resp. inter Sparke  
& Sparke.  
(1. Co. 46.)

## CHAP. 8.

## Of Tenant at Will.

## Sect. 68. [55. a.]

**T**ENANT a volunt est, ou terres ou tenements sont lessés per un home a un auter, a aver et tener a luy a la volunt le lessor, per force de quel lease le lessee est en possession. En tiel cas le lessee est appel tenant a volant, pur ceo que il n'ad aucun certaine ne sure estate, car le lessor luy poit ouster a quel temps que il luy plerroit. Uncore si le lessee emblea la terre, et le lessor, apres l'embleer et devant que les blees sont matures, luy ousta, uncore le lessee avera les blees, et avera frank entre egres et regres a scier et de curier les blees, pur ceo que il ne scavoit a quel temps le lessor voloit entre sur luy. Autrement est si tenant pur terme d'ans que conust le fine de son terme emblea sa terre, et le terme est finy devant que les blees sont matures. En ceo cas le lessor, ou celui en la reversion avera les blees, pur ceo que le termor conust le certainie de su terme quant sa terme serroit finy.

**T**ENANT at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him. Yet if the lessee soweth the land, and the lessor, after it is sowne and before the corne is ripe, put him out, yet the lessee shall have the corne, and shall have free entry egress and regress to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him. Otherwise it is if tenant for yeares, which knoweth the end of his terme, doth sow the land, and his terme endeth before the corne is ripe. In this case the lessor, or he in the reversion shall have the corne, because the lessee knew the certainty of his terme and when it would end.

Fleta, lib. 3.  
cap. 16.

(1. Ro. Abr. 858.)  
19 H. 6. 1.  
38 H. 6. 21.  
9 E. 4. 1. b.  
10 E. 4. 18. b.  
21 H. 7. 38.  
13 H. 8. 16.  
14 H. 8. 14. 14. (2)

**T**ENANT a volunt est, ou terres ou tenements sont lessés per un home a un auter, a aver et tener a luy a la volunt le lessor, &c." (1) It is regularly true, that every lease at will must in law be at the will of both parties, and therefore when the lease is made, to have and to hold at the will of the lessor, the law implyeth it to be at the will of the lessee also; for it cannot be onely at the will of the lessor, but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor; and so are all the bookes that seeme *primâ facie* to differ, clearly reconciled (3).

Fleta, lib. 3.  
cap. 16.

"Pur ceo que il n'ad aucun certaine ou sure estate, &c." *Alia possessio est precaria, et alia pro prece concessa, ut si quis sine scripto concesserit alicui habitationem vel usumfructum in re sua tenenda ad voluntatem suam, hæc quidem possessio precaria est et nuda, eo quòd tempestivè et intempestivè pro voluntate domini poterit revocari.*

"Uncore

(1) [See Note 360.]

(2) 49 H. 6. 18. 20 E. 4. 9. Ital. MSS.

(3) [See Note 361.]

"*Uncore si le lessee emblea la terre, et le lessor apres le emblecer, &c.*"

(4) The reason of this is, for that the estate of the lessee is uncertaine, and therefore lest the ground (5) should be unmanured, which should

[55. b.] be hurtfull to the commonwealth, he shall reape the crop which he sowed in peace, albeit the lessor doth determine his wil before it be ripe. And so it is if he set rootes, or sow hempo or flax, or any other annual profit, if (1) after the same be planted, the lessor oust the lessee; or if the lessee dieth, yet he or his executors shall have that yeare's crop. But if he plant young fruit trees, or young oaks, ashes, elmes, &c. or sow the ground with acornes, &c. there the lessor may put him out notwithstanding, because they will yeeld no present annuall profit. And this is not only proper to a lessee at will, that when the lessor determines his will that the lessee shall have the corne sowne, &c. but to every particular tenant that hath an estate incertaine, for that is the reason which Littleton expressed in these words (*pur ceo que il n'ad aucun certaine ou sure estate*) (2). And therefore if tenant for life soweth the ground, and dieth, his executors shall have the corne, for that his estate was uncertaine, and determined by the act of God (3). And the same law is of the lessee for yeares of tenant for life (4). So if a man be seised of land in the right of his wife, and soweth the ground, and he dieth, his executors shall have the corne, and if his wife die before him he shall have the corne (5). But if husband and wife be jointenants of the land, and the husband soweth the ground, and the land surviveth to the wife, it is said, [a] that she shall have the corne (7). If tenant *pur terme d'auter vie* soweth the ground, and *cesty que vie* dieth, the lessee shall have the corne. If a man seised of lands in fee hath issue a daughter and dieth, his wife being *enascint* with a son, the daughter soweth the ground, the sonne is borne, yet the daughter shall [b] have the corne, because her estate was lawful, and defeated by the act of God, and it is good for the commonwealth that the ground be sowne (8). [c] But if the lessee at will sow the ground with corne, &c. and after he himself determine his will and refuseth to occupy the ground, in that case the lessor shall have the corne, because he loseth his rent. And if a woman that holdeth land *durante viduitate sua* soweth the ground and taketh husband [d], the lessor shall have the embleaments, because that the determination of her owne estate grew by her owne act. But where the estate of the lessee being incertaine is defeasible by a right paramount, or if the lease determine by the act of the lessee, as by forfeiture, condition, &c. [e] there he that hath the right paramount, or that entreteth for any forfeiture, &c. shall have the corne (10).

If a disseisor sow the ground and sever the corne, and the disseisee re-enter, [f] he shall have the corne, because he entreteth by a former title, and severance or remooving of the corne altereth not the case, for the regresse is a recontinuacion of the freehold in him in judgment of law from the beginning (11).

- (4) [See Note 362.]  
(5) [See Note 363.]

[55. b.]

- (1) [See Note 364.]  
(2) [See Note 365.]  
(3) [See Note 366.]  
(4) See Goulash. 144.

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- (5) [See Note 367.]  
(6) 7. Ass. 13. 10. Ass. 6. 7 E. 3. 57.  
Hal. MSS.  
(7) [See Note 368.]  
(8) [See Note 369.]  
(10) Vid. 20 E. 3. Trespasse 194. 46.  
Ass. 2. Hal. MSS.  
(11) [See Note 370.]

(5. Co. 85. a.  
1. Sd. 329.)

18 E. 4. 19.  
(Cro. Cha. 618.)

Temps E. 1.  
br. 24. 10. Ass.  
pl. 6.  
10 E. 3. 39.  
46 E. 3. 1.  
7 H. 4. 17.  
7. Ass. 19.  
5. Co. 116.  
Oland's case.  
(2. Inst. 81.  
Hob. 128.  
5. Co. 85.  
1. Ro. Abr. 727.)

[a] 8. Ass. 31.  
5 E. 3. 64.  
Dyer 316. (6)  
(Cro. Cha. 618.)

[b] 16 H. 6. 6.

[c] 5. Co. 116.  
Oland's case. (9)

(1. Ro. Abr. 726.)

[d] Oland's case  
ubi supra.  
(Dy. 31.  
11. Co. 51. b.)

[e] 33 E. 3.  
Tresp. F. 264.  
48 E. 3. 26.  
Oland's case ubi  
supra.

[f] 27 H. 6. 3.  
37 H. 6. d.  
12 E. 4. 45.  
14 E. 4. 6.  
15 E. 4. 31.  
3 H. 7. 1.  
5 H. 7. 17.  
13 H. 7. 26.

10 H. 4. 1. 28 H. 3. 32. Dyer.

[g] 44 E. 3. 15.  
Pleta, lib. 3.  
cap. 15.

[g] If tenant by statute merchant soweth the ground, and then a sudden and casual profit falleth by which he is satisfied, he shall have the embleaments (12).

[A] 35 H. 6. 24.  
31 H. 6. 9.  
1 E. 4. 3.  
31 E. 4. 5.  
Pl. Com. paroch de  
Honyland's case.

"*Le lessor luy fait ouster.*" There is an expresse ouster, and implied ouster: an expresse, as when the lessor commeth upon the land, and expresly forewarneth the lessee to occupy the ground no longer; an implied, as if the lessor without the consent of the lessee enter into the land and cut downe a tree, this is a determination of the will, for that it should otherwise be a wrong in him, unless the trees were excepted, and then it is no determination of the will, for then the act is lawfull albeit the will doth continue. If a man leaseth a manor at will whereunto a common is appendant, if the lessor put in his beasts to use the common, this is a determination of the will (13). The lessor may by actual entry into the ground determine his will in the absence of the lessee (14), but by words spoken from the ground the will is not determined until the lessee hath notice (15). No more then the discharge of a factor, attorney, or such like in their absence is sufficient in law until they have notice thereof.

(1. Ro. Abr. 360.  
Post. 345. b.  
8. Co. 89.  
5. Co. 90.  
14 E. 4. 6.  
8 E. 4. 11, &c.

[a] If a woman make a lease at will reserving a rent, and she taketh husband, this is no countermand of the lease at will, but the husband and wife shall have an action of debt for the rent; and so it is if a lease be made to a woman at will reserving a rent, and the lessee taketh husband, this is no countermand of the lease, but the lessor may have an action of debt or distreine them for the rent. So if the husband and wife make a lease at will of the wife's land reserving a rent and the husband die, yet the lease continueth. In like manner if a lease be made by two to two others at will, and the one of the lessors or of the lessees die, the lease at will is not determined in neither of those cases; which are necessary points to be knowne (16).

[a] 5. Co. 10.  
Henstead's case.  
10 Eliz.  
Dier 269. b.

"*Après l'embleer et devant que les blees sont matures.*" Then put the case that the corne is ripe and ready to cut downe, and the lessor, before the lessee reapeth it, enter and put out the lessee, whether shall the lessee have the corne? And it is without all question that the lessee shall have it, for by the same reason that he shall have it when he is put out before it be ripe, he shall have it when he is put out when it is ripe. *Et ubi eadem est ratio, ibi idem jus.* [56. a.]

[b] Tempe E. 1.  
66. Grant. 4.  
9 E. 4. 35.  
9 E. 3. treap. 13.  
21 H. 7. 14. b.  
8 H. 6. 18. b.  
3 R. 2.  
barre 237.  
14 H. 8. 2.  
27 H. 8. 18. b.  
(11. Co. 22.)

"*Et auxi franke entrie, egress et regres.*" [b] For when the law doth give any thing to one, it giveth impliedly whatsoever is necessary for the taking and enjoying of the same: *Quando lex aliquid alicui concedit, concedere videtur et id, sine quo res ipsa esse non potest* (1): and the law in this case driveth him not to an action for the corne, but giveth him a speedy remedy to enter into the land, and to take and carry it away, and compelleth not him to take it at one time, or to carry it before it be ready to be carried; and therefore the law giveth

(12) See further on this subject *infra*, and also Perk. sect. 512. to 524. Vin. Abr. *Emblements per tot.* and *Executor*, U. Com. Dig. *Biens*, B. C. and G. New Abr. *Executors* and *Administrators*, H. 3. and Gilb. Law of Evid. 242. to 252.

(13) [See Note 371.]

(14) [See Note 372.]

(15) [See Note 373.]

(16) [See Note 374.]

[56. a.]

(1) See further on this maxim Finch. Disc. on Law 63. and Finch. Descript. of Law 16. b.

giveth all that which is convenient, viz. free entry, egress and regress as much as is necessary.

If the lessee be disturbed of this way which the law doth give unto him, he shall have his action upon his case, and recover his damages; and this action the law doth give unto him, for whensoever the law giveth any thing, it giveth also a remedy for the same. But here is to be observed a diversity betwene a private way, whereof *Littleton* here speaketh, and a common way. For if the way be a common way, if any man be disturbed to goe that way, or if a ditch be made overthrowing the way so as he cannot goe, yet shall he not have an action upon his case; and this the law provided for avoyding of multiplicity of suites, for if any one man might have an action, all men might have the like. But the law for this common nuisance hath provided an apt remedy, and that is by presentment in the leete or in the torne, unlesse any man hath a particular damage; as if he and his horse fall into the ditch, whereby he received hurt and losse, there for this special damage, which is not common to others, he shall have an action upon his case (2); and all this [c] was resolved by the court in the king's bench. And in that case it was said, that it had bene adjudged in that court betwene *Westbury* and *Powell*, that where the inhabitants of *Southwarke* had by custome a watering place for their cattell which was stopped up by *Powel*, that in that case any inhabitant of *Southwarke* might have an action; for otherwise they should be without remedy, because such a nusans is not presentable in the leete or torne. Note the diversity.

There be three kinde of wayes, whereof you shall [d] read in our ancient bookes. First, a foot way, which is called *iter*, *quod est jus cundi vel ambulandi hominis*; and this was the first way.

The second is a foot way and horse way, which is called *actus ab agendo*; and this vulgarly is called *packe* and *prime way*, because it is both a foot way, which was the first or *prime way*, and a *packe* or *drift way* also.

The third is *via* or *aditus*, which contains the other two, and also a cart way, &c. for this is *jus cundi, vehendi, et vehiculum et jumentum ducendi*; and this is twofold, viz. *regia via*, the king's highway for all men, *et communis strata*, belonging to a city or towne, or betwene neighbours and neighbours. This is called in our bookes *chimin*, being a *French* word for a way, whereof commeth *chiminage*, *chiminagium*, or *chimmagium*, which signifieth a toll due by custome for having a way through a forest; and in ancient records it is some time also called *pedagium* (3).

If the lessee at will by good husbandry and industry, either by overflowing or trenching, or compassing of the meadows, or digging up of bushes or such like, make the grasse to grow in more abundance, yet if the lessor put him out, the lessee shall not have the grasse, because that the grasse is the naturall profit of the earth. And the same law is if he doth sow hay-seed, and thereby encreaseth the grasse.

"*Autrement est si tenant pur terme d'ans que conust le fine de son terme, &c.* Well said *Littleton* (which knoweth the end of his terme) that is, where the end of the terme is certaine; but where the lease for yeares depends upon an uncertainty, as upon the death of tenant for life being made by him, or of a husband seised in the right of his wife, or the like, there it is otherwise.

(2) [See Note 375.]

(3) See further as to *ways* tit. *Chimin* in

Com. Dig. and Vin. Abr. and tit. *Highway*, in New Abr. and Burn. Just.

(5. Co. 200. 204 b.  
1. Ro. Abr. 89.  
Cro. Jam. 446.  
491. F. N. B.  
176. b.  
Cro. Jam. 189.)

[c] 27 E. 3. 37a.  
3 E. 4. 9.  
5 E. 4. 2.  
Tr. 41. Ekz. 50  
twene Finicux  
and Howenden.  
Vid. 5. Co. 72.  
Williams's case.

[d] Fleta, lib. 4.  
cap. 37.  
Bracton, lib. 4.  
fol. 232.  
(1. Ro. Abr. 300.)

32 E. 3.  
barre 261.  
27 E. 3. 73.  
6 E. 3. 33.

Carta de foresta,  
cap. 14.

(F. N. B. 149.  
Ante 23. a.  
Post. 171. a.  
179. a.)

## Sect. 69.

**I**TEM, si un mese soit lessee a un home a tener a volunt, per force de quel le lessee enter en le mese, deins quel mese il porta ses utensils de meason, et puis le lessor luy ousta, uncore il avera franke entre egresse et regresse en mesme le mese per reasonable temps de carrier ses biens et utensils. Sicome home seisié d'un mese en fee simple, fee taile, ou pur terme de vie, lequel ad certaine biens deins meme le mese, et fait ses executors et devy; queconque apres sa mort ad le mese, uncore les executors averont frank entry egresse et regres de carier hors de mesme le mese les biens lour testator per reasonable temps.

**A**LSO, if a house be lotten to one to hold at will, by force whereof the lessee entreth into the house, and brings his household-stuff into the same, and after the lessor puts him out, yet he shall have free entrie egresse and regresse into the said house by reasonable time to take away his goods and utensils. As if a man seised of a mese in fee simple, fee taile, or for life, hath certaine goods within the sayd house, and makes his executors, and dieth; whosoever after his decease hath the house, his executors shall have free entry egresse and regresse to carrie out of the same house the goods of their testator by reasonable time.

“**S**I un mese soit lease a un home a tener a volunt, &c.” The reason of this is evident upon that which hath been said before.

(a Co. 59. a.)

[a] 31 Ed. ca. 1.  
in Domesday.  
[b] Reg. 163.  
F. N. B. 137.  
4 E. 2.  
Vouch. 244.  
Six acres of land  
may be parcel of a  
house.  
(Post. 300. b.)  
[c] 22 E. 4. 27.  
34 H. 6. 40.  
(Cro. Jam. 335.  
304.  
Hob. 60. 135.  
2. Instit. 4. 6.  
3 Ro. Rep. 143.  
163.  
1. Ro. Abr. 536.  
2. Ro. Abr. 578.  
5. Co. 100. a.)  
[d] Bract. 2. 2.  
ca. 52. b.  
(Post. 59. b. 62. a.)

“Mese,” or *Maison*, called in legall *Latine messuagium*, [56. b.] containeth (as hath beene said) the buildings, curtelage, [56. b.] orchard, and garden (1).

Cottage, *cotagium*, is a little house without land to it. [a] See 31 *Eliz.* cap. 1. and cottagers in *Domesday booke* are called *cotterelli*: and in ancient records *haga* signifieth a house. If a man hath a house neer to my house, and he suffereth his house to be so ruinous as it is like to fall upon my house, [b] I may have a writ *de domo reharandâ*, and compell him to repair his house (2). But a *fractio* lieth not *de domo*, but *de messuagio*.

“*Per reasonable temps.*” [c] This reasonable time shall be adjudged by the discretion of the justices before whom the cause dependeth; and so it is of reasonable fines, customes, and services, upon the true state of the case depending before them: for reasonbleness in these cases belongeth to the knowledge of the law, and therefore to be decided by the justices [d]. *Quam longum esse debet non definiunt in jure, sed pendet ex discretionē justitiariorum.* And this being said of time, the like may be said of things incertaine, which ought to be reasonable; for nothing that is contrary to reason, is consonant to law.

[a] 3 H. 6. 15.  
21 H. 6. 30.

[c] “*Sicome home seisié d'un mese en fee simple, ou fee taile, &c.*” This is so evident, as it needeth no explanation.

(1) See ante 5. b. note 1. where some authorities are cited to shew,

how much will pass by the word *messuage*.

(2) [See Note 376.]

## Sect. 70.

**I**TEM, si un home fait un fait de feoffment a un auter de certaine terre, et delivrer a luy le fait, mes nemy liverie de seisin; en ceo case celuy, a que le fait est fait, poit enter en le terre, et tener et occuper a la volunt celuy, que fist le fait pur ceo que il est prove per les parols del fait, que il est la volunt que le auter avera la terre; mes celuy que fist le fait luy poet ouster quant luy pleist.

**A**LSO, if a man make a deed of feoffment to another of certain lands, and delivereth to him the deed, but not liverie of seisin; in this case he, to whom the deed is made, may enter into the land, and hold and occupie it at the will of him, which made the deed, because it is proved by the words of the deed, that it is his will that the other should have the land; but he which made the deed may put him out when it pleaseth him.

**H**ERE it appeareth, that if the feoffee doth enter, he is tenant at will, because he entreth by the consent of the feoffor.

(1. Ro. Abr. 359.  
3. Co. 66. b.)

“*Et deliver a luy le fait.*” Albeit the deed be delivered upon the ground, yet doth it not amount to a livery of seisin of the land; for it hath its naturall effect to make it a deed. [f] *Donationum alia perfecta, alia incepta et non perfecta: ut si donatio lecta fuerit et concessa, ac traditio nondum fuerit subsequuta.* But if the deed be delivered in name of seisin of the land, or if the feoffor saith to the feoffee, Take and enjoy this land according to the deed; or, Enter into this land, and God give you joy; these words do amount to a livery of seisin.

(3. Co. 20.  
Ante 48. a.)  
[f] Flet. li. 3.  
ca. 3. & ca. 15.  
43 E. 3. the  
Feof. & Feits 61.  
35 H. 8. Feof.  
Br. 27. Ass. 61.  
38. Ass. 2.  
39. Ass. 18.  
41 E. 3. 17.  
6. Co. 26. Sharp's  
case.  
(Ante 48. a.)

## Sect. 71.

**I**TEM, si un mese soit lesse a tener a volunt, le lessee n'est pas tenu a susteiner ou repaier le meason, sicome tenant a terme d'ans est tenu. Mes si le lessee a volunt fait volontaire wast, sicome en abatement des measons, ou en couper des arbres, il est dit que le lessor avera de ceo envers luy action de trespasse. Sicome jeo bayle a un home mes barbits a compester sa terre, ou mes boefes a arer la terre, et il occist mes avers, jeo puissoy bien aver un action de trespasse envers luy, nient obstant le bailement.

**A**LSO, if a house be leased to hold at will, the lessee is not bound to sustain or repaire the house, as tenant for terme of years is tyed. But if tenant at will commit voluntary wast, as in pulling downe of houses or in felling of trees, it is said that the lessor shall have an action of trespasse for this against the lessee. As if I lend to one my sheepe to tathe his land, or my oxen to plow the land, and he killeth my cattell, I may well have an action of trespass against him, notwithstanding the lending.

(3. Co. 13. b.)

"*Si un mese soit lesee a tener a volunt, le lesee n'est pas tenuus, &c.*"  
**S** For the statute of Gloucester above mentioned extends not to a tenant at will, and therefore for permissive wast, the lessor hath no remedy at all (1).

[g] 31 H. 6. 32.

22 E. 3. 24.

13 H. 4. 3.

22 E. 4. 20.

"*Mes si lesee a volunt fait voluntary wast, &c.*" [g] And true it is, that if tenant at will cutteth downe timber trees, or voluntarily pull downe and prostrate houses, the lessor shall have an action of trespassse against him, *quare vi et armis*; for the taking upon him power to cut timber, or prostrate houses, concerneth so much the freehold and inheritance, as it doth amount in law to a determination of his will: [h] and so hath it beene adjudged (2).

(1. Ro. Abr. 860.

2. Ro. Abr. 555.)

[A] Mich. 28 &amp; 29

E. 4.

Rot. 318. in Com.

Banc. inter Walgrave &amp; Somerset. V. le Counte de Shrewsburie's case, 3. Co. 12. b.

[i] 27 H. 6. 3.

22 E. 4. 8.

G. Instit. 154.

1. Ro. Abr. 661.

663. 669.

Feet. 27. b.

Cro. Cha. 303.

Cro. Jac. 606.

4 Leon. 34.)

[i] If tenant at will granteth over his estate to another, and the grantee entreth, he is a disseisor (3), and the lessor may have an action of trespassse against the grantee; for albeit the grant was void, yet it amounteth to a determination of his will.

"*Sicome jeo baile a un home mes barbits a compester son terre, &c.*"

And the reason is, [k] that when the bailee having but a bare use of them, taketh upon him as an owner to kill them, he loseth the benefit of the use of them. Or in these cases he may have an action of trespassse *sur le case* for this conversion, at his election (4).

[A] V. 11 H. 4.

24. 1 E. 4. 9. b.

13 E. 4. 8.

21 E. 4. 19. &amp;

70. 22 E. 4. 8.

3 H. 7. 4.

21 H. 7. 24.

Fleta, B. 2. ca. 1.

G. Ro. Abr. 860.

Cro. Cha. 25.)

(A. Inst. 123.)

3. Inst. 20, 21.)

"*Trespassse.*" *Transgressio, derivatur a transgrediendo*, because it passeth that which is right: *Transgressio autem est, cum modus non servatur, nec mensura: debet enim quilibet in suo facto modum habere, et mensuram.* *Nota*, in the lowest and the highest offences there are no accessaries, but all are principalls; as in ryots, routs, forcible entries, and other transgressions *vi et armis*, which are the lowest offences; and so in the highest offence, which is [57. b.] *crimen laesa majestatis*, there be no accessaries; but in felonies there be accessaries both before and after.

## Sect. 72.

**N**OTA, si le lessor sur tiel lease a volunt reserve a luy un annuall rent, il poit distrainere pur le rent arere, ou aver de ceo un action de debt a son election.

**N**OTE, if the lessor upon a lease at will reserve to him a yearly rent, he may distreine for the rent behinde, or have for this an action of debt at his owne election (1).

22 H. 7. 30. b.

2 E. 4. 6. b.

7 E. 4. 27. a.

6 H. 3.

Averrie 26.

"*Il poet distreyner pur le rent arere, ou aver de ceo un action de debt, &c.*" But if he impound the distresse upon the ground letten at will, the will is determined. Note, he may distreine for the rent, and yet it is no rent service, for no fealty belongeth thereunto, but a rent distreinable of common right.

There

(1) [See Note 377.]

(2) [See Note 378.]

(3) [See Note 379.]

(4) [See Note 380.]

[57. b.]

(1) [See Note 381.]



There is a great diversity between a tenant at will and a tenant at sufferance; for tenant at will is alwaies by right, and tenant at sufferance entreth by a lawfull lease, and holdeth over by wrong. A tenant at sufferance is he that at the first came in by lawfull demise, and after his estate ended continueth in possession and wrongfully holdeth over (2). [l] As tenant *per terme d'auter vie* continueth in possession after the decease of *Ce' que vie*, or tenant for yeares holdeth over his terme; the lessor cannot have an action of trespasse before entry. Now that a writ of entry *ad terminum qui preterit* lyeth against such a tenant as holdeth over is rather by admission of the demandant, then for any estate of freehold that is in him, for in judgement of law he hath but a bare possession. But against the king there is no tenant at sufferance, but he that holdeth over in the cases abovesaid is an intruder upon the king, because there is no laches imputed to the king for not entring (4). [m] If tenant in taile of a rent grant the same in fee and dieth, yet the issue in taile may bring a *formedon*, and admit himselfe out of possession. The like law is it, if a man maketh a lease at will and dieth, now is the will determined; and if the lessee continueth in possession, he is tenant at sufferance, and yet the heyre by admission may have an assise of Mordancestor against him (5). [n] But there is a diversity between particular estates made by the *terre tenaunt*, as above is said, and particular estates created by act in law: as if a gardian after the full age of the heire continueth in possession, he is no tenant at sufferance, but an abator, against whom an assise of Mordancestor doth lye (6). *Et sic de similibus* (7).

(Post. 142. a.)

[l] Bracton, lib. 4. fol. 318.  
4 E. 3. 30.  
7 E. 3. 13.  
24 E. 3. 24.  
38 E. 3. 28.  
7 E. 2. 8aver de def. 30.  
8 E. 4. 25.  
4 H. 6. 30.  
22 E. 4. 34.  
18 E. 4. 25.  
F. N. B. 201.  
D. 203. 8 E. 2. entre 67.  
Tempe H. 8.  
Br. 15. tit.  
Tenant a volunt.  
Pl. Com. 138.  
4 H. 7. 3. (3)  
(Post. 270. b.  
Cro. Cha. 187.  
Cro. Jam. 109.  
Ante 87. a.)  
[m] 13 H. 7. 10. a.  
31 H. 6. 54.  
5 E. 4. 3.  
22 E. 2. de Discont.  
48 E. 3. 23.  
Pl. Com. 435.  
10 E. 3. bre. 468.  
15 E. 4. Discont. 39.  
6 E. 3. 54, 57.  
21 E. 4. 2.

21 H. 7. 38. 10 E. 4. 18. Per Choche &amp; Litt.

[n] Statute de Moribridge, cap. 26.

Abb. Ass. 120. b. F. N. B. 196.

11 E. 4. 10. &amp; 11. Bract, lib. 4. fo. 253, 253. (Post. 271. 1. Ro. Abr. 663.)

(2) [See Note 382.]

(3) Vid. 21 H. 6. 38. Hal. MSS.

(4) 4 H. 6. 12. Hal. MSS.

(5) [See Note 383.]

(6) [See Note 384.]

(7) See further as to tenant by sufferance in title *Estate*, Vin. Abr. and Com. Dig.

## CHAP. 9.

## Tenant by Copie.

## Sect. 73.

**T**ENANT *per copie de court rol'* est (8), deins quel manor il y ad un custome que ad est use de temps dont memorie ne court, que certaine tenants deins mesme le manor ont use d'aver terres et tenements, a tener a eux et a lour heires en fee simple, ou en fee taile, ou a terme de vie, &c. a volunt le seignior solonque le custome de mesme le manor.

**T**ENANT by copy of court roll is, as if a man be seised of a manor within which manor there is a custome, which hath beene used time out of minde of man, that certaine tenants within the same manor have used to have lands and tenements, to hold to them and their heires in fee simple, or fee taile, or for terme of life, &c. at the will of the lord (1) according to the custome of the same manor.

(2) Co. 7.  
Hydan's case.  
1. Mo. Abr. 498.)

**T**ENANT *per copie, &c. Tenens per copiam rot. Cur'. Copiae* we call in *Latine copiam*, though *copia* in his proper signification signifieth plenty; but we have made a *Latine* word of the *French* word *copie*: and this is ancient; for in the *Register*, fol. 51. there is a writ de *copiâ libelli deliberandâ*, which is grounded upon the statute of 2. H. 2. ca. There is no tenant in the law that holdeth by copie, but onely this kinde of customary tenant, for no man holdeth by copie of a charter, or by copy of a fine, or such like, but this tenant holdeth by copy of court roll. [58. a.]

(a) Bracton.  
lib. 2. cap. 2.  
fol. 26. & lib. 4.  
fol. 209.  
Britton, 165.  
Fleta, lib. 1.  
ca. 2. & lib. 2.  
cap. 6.  
Item de customa-  
ria.  
Ockham Cap. quid  
murdrum.  
F. N. B.  
1. 12. c.  
[b] 1 H. 5. 11.  
14 H. 4. 34.  
42 E. 3. 25.  
Vit. 4. Co. 2.  
Browne's case.  
[c] Lamb. verb.  
Terra ex scripto.

[a] Bracton calleth copiholders *villanos sockmannos*, not because they were bond, but because they held by base tenure, by doing of villein services.

And Britton saith, that some that be free of blood doe hold land in villenage; and Littleton himselfe in the next Chapter calleth them tenants by base tenure: and in *F. N. B.* fol. 12. C. *Et cest terme, que est ore a cest jour apfel copitenaunts, ou copiholders, ou tenaunts per copie, est forsque un novel noame trove, car d'ancien temps ils feur' apfelles tenants in villenage, ou de base tenure, &c.* [b] And yet in 1 H. 5. 11. they be called copiholders; in 14 H. 4. 34. *tenant per le verge*; in 42 E. 3. 25. *tenant per roll solonque le volunt le seignior*; and in the statute of 4 E. 1. called *extenta manerii*, they are called *customarii tenentes*, and so doth Fleta call them; and before him Ockam (2) (who wrote in the raigne of H. 2.) spake of them, and how, and upon what occasion they had their beginning.

[c] *Terra ex scripto Saxonice Bockland. Fundum veteres aut ex scripto qui Bockland, i. bookland, aut sine scripto qui Folkland dicebatur, possidebant. Qua fuit ex scripto possessio commodiore erat possessione, libera, atque immunis. Fundus sine scripto censum pensabat annuum, atque officiorum servitute quoddam est obligatus. Priorem viri plerumque nobiles atque ingenui, posteriorem rustici fere et pagani possidebant* (3).

4. Inst. 385.)

"Court." Curia, court, is a place where justice is judicially ministred, and is derived à cura, quia in curiis publicis curas gerebant.

(8) Si come un home soit seise d'un maner.  
L. and M.—Roh.—P. and Red.

[58. a.]

(1) [See note 385.]

(2) [See note 386.]

(3) See ante 5. b. and note 1. there, and 6. a. and note 6. there.

*ant* [d]. The court baron must be holden on some part of that which is within the mannor, for if it be holden out of the mannor it is voyd; unlesse a lord being seised of two or three mannors hath usually time out of mind kept at one of his manors courts for all the said manors, then by custome such courts are sufficient in law, albeit they be not holden within the severall mannors (4). And it is to be understood that this court is of two natures. The first is by the common law, and is called a court baron, as some have said, for that it is the freeholders or freemens court (for barons in one sense signifie freemen), and of that court the freeholders being suitors be judges, and this may be kept from three weekes to three weekes. The second is a customary court, and that doth concerne copiholders, and therein the lord or his steward is the judge. Now as there can be no court baron without freeholders, so there cannot be this kind of customary court without copiholders or customary holders. And as there may be a court baron of freeholders only without copiholders, and then is the steward the register, so there may be a customary court of copiholders onely without freeholders, and then is the lord or his steward the judge (5). And when the court baron is of this double nature, the court roll containeth as well matters appertaining to the customary court, as to the court baron.

And for as much as the title or estate of the copiholder is entred into the roll whereof the steward delivereth him a copie, thereof he is called copiholder. [e] It is called a court baron, because among the lawes of king *Edward the Confessor* it is said: *Barones verò qui suam habent curiam de suis hominibus, &c.* taking his name of the baron who was lord of the mannor, or for that properly in the eye of law it hath relation to the freeholders, [f] who are judges of the court. And in ancient charters and records the barons of *London*, and barons of the *Cinque Ports*, do signify the freemen of *London* and of the *Cinque Ports*.

“*Seisie d'un mannor.*” *Manerium dicitur à manendo secundum excellentiam sedes magna fixa et stabilis. Lageman, i. habens socam et sacam super homines suos, &c.* [g] *Et sciendum est, quòd manerium poterit esse per se ex pluribus edificiis coadjuvatum sive villis et hamlettis adjacentibus. Poterit etiam esse manerium et per se et cum pluribus villis, et cum pluribus hamlettis adjacentibus, quorum nullum dici poterit manerium per se sed villa sive hamletta. Poterit etiam esse per se manerium capitale, et plura continere sub se maneria non capitata, et plures villas et plures hamlettas quasi sub uno capite aut dominio uno.* And afterwards, *Manerium autem fieri poterit ex pluribus villis vel una, plures enim ville poterunt esse in corpore manerii sicut et una* (6). And in these [h] ancient authors you shall see the difference *inter mansionem, villam, et manerium*. Concerning the institution of this court by the lawes and ordinances of ancient kings,

[58. b.] and especially of king *Alfred*, it appeareth that the first kings of this realme had all the lands of *England* in demeane (1), and *les grand manors et royalties* they reserved to themselves, and of the remnant they, for the defence of the realme, enfeoffed the barons of the realme with such jurisdiction as the court baron now hath, and instituted the freeholders to be judges of the court

[d] Vid. 4. Co. 34. inter Murrell & Smith. Eodem lib. fol. 37. inter Clifton and Molinieux. (1. Ro. Abr. 527.)

4 Co. 36. Melwiche's case. Britton, fol. 574.

(4 Co. 36. b.)

[e] Larrin, fol. 138. and 1206. Cambden Brit. fo. 121. b. Britton, fol. 374. [f] Mirror, cap. 1. sect. 3.

Domesday.

[g] Bracton, lib. 4. fo. 112. Fleta, lib. 4. c. 15. & lib. 6. cap. 49. Britton, fol. 124.

[h] Bract. lib. 5. fo. 434. Fleta, ubi supra. Mirror, cap. 2. sect. 3.

(4) [See Note 387.]

(5) [See Note 388.]

(6) For other explanations of the word *manor*, see in Cow. Interp. voc. *Manor*, and the books there cited, particularly

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Fulb. Paral. part 1. fol. 18. a.

[58. b.]

(1) See as to this ante 1. b. and the authorities in note 1. there.

court baron. And herewith agreed the aforesaid law of Saint Edward. And it is to be observed that in those ancient lawes under the name of barons were comprised all the nobility.

There may be a customary manor granted by copie of court roll (2). So although the word be (*scisse*) which properly betokeneth a freehold, yet tenant for yeares, tenant by statute merchant, staple, *elegit*, and tenant at will, gardian in chivalrie (3), &c. who are not properly scised but possessed, are *dominii pro tempore*, not only to make admittance, but to grant voluntary copies of ancient copihold lands which come into their hands (4). And therefore there is a diversity between disseisors, abators, intruders, and others that have defeasible titles; for their voluntary grants of ancient copihold lands shall not bind the disseisees or others that right have (5). And voluntary grants by copie, made by such particular tenants as is aforesaid, shall binde him that hath the freehold and inheritance, because all these be lawfull lords for the time being; but so is not a tenant at sufferance, because he is in by wrong, as hath been said; and so [i] was it adjudged *P. 29. Eliz. inter Rowse et Artois, 4. Co. 24.* But admittances made by disseisors, abators, intruders, tenants at sufferance, or others that have defeasible titles, stand good against them that right have, because it was a lawfull act, and they were compellable to doe them.

[k] And yet in some speciall case an estate may be granted by copie, by one that is not *dominus pro tempore*, nor that hath any thing in the manor. As if the lord of a manor by his will in writing deviseth, that his executor shall grant the customary tenements of the manor according to the custome of the manor for the payment of his debts, and dieth, the executor having nothing in the manor, may make grants according to the custome of the manor (6).

*"Deins quel mannor il y ad un custome, que ad este use de temps dont memory ne court, &c."* Of this custome here spoken of there be three supporters. The first is time, and that must be out of memory of man, which is included within this word (custome), so as copihold cannot begin at this day. [l] The second supporter is, that the tenements be parcell of the manor or within the manor, which appeares by these words of *Littleton, que certaine tenants deins mesme le mannor, &c.* The third supporter is, that it hath beene demised and demisable by copie of court roll; for it need not be demised time out of mind by copie of court, but if it be demisable it is sufficient. For example: if a copihold tenement escheat to the lord, and the lord keepeth it in his hands by many yeares, during this time it is not demised but demisable, for the lord hath power to demise it againe (7).

*"A volunt le seignior selonque le custome."* So as he is not a bare tenant at will, but a tenant at will according to the custome of the mannor, as shall be spoken more hereafter in this Chapter.

*"Certaine tenements."* What things may be granted by copie, is necessary to be knowne. First, a manor may be granted by copie (8). Secondly, underwoods without the soile may be granted by copie to one

(1. Co. 140. b.  
Cro. Jam. 260.  
Mo. 95.  
8. Co. 63. b.  
1. Ro. Abr. 499.  
4. Co. 26. b.  
23. b. Cro.  
Jam. 98.)

[i] 4. Co. 24.  
P. 29. Eliz.  
inter Rowse & Artois.

[k] Dier. Mich.  
7 & 8 Eliz.  
Manuscript.

[l] Vid. 4. Co.  
24 inter Murrell  
& Smith.

(1. Ro. Abr. 498.)  
11. Co. 17.  
Sir H. Nevill's  
case. 4. Co. 30.  
31. inter Hee &  
Tayler.

(2) This is denied in Cro. Jam. 260. and is a point which has been much controverted. See Vin. Abr. *Copihold*, E. and Com. Dig. *Copihold*, C. 1.

(3) [See Note 389.]

(4) [See Note 390.]

(5) [See Note 391.]

(6) [See Note 392.]

(7) [See Note 393.]

(8) See note 2. supra.

one and to his heires, and so may the herbage or vesture of land, Thirdly, generally all lands and tenements within the manor and whatsoever concerneth lands or tenements may be granted by copie: as a faire appendant to a mannor may be granted by copy, &c. (9).

“*Consuetudines.*” This word *consuetudo* being derived à *consuetudo*, properly signifieth a custome, as here *Littleton* taketh it: but in legall understanding it signifieth also tolles, murage, pontage, pavage, and such like newly granted by the king; and therefore when the king grants such things, the words be, *Concessimus, &c. in auxilium ville predictæ faciendæ &c. consuetudines subscriptas, viz. de quolibet sunnagio, &c.*

And it was an article of the justices in eire to inquire *de novis consuetudinibus levatis in regno, sive in terrâ, sive in aquâ, et quis eas levavit et ubi*; where *consuetudo* is taken for tolles and such like taxes or charges upon the subject.

Regist. F. N. B.  
270. d.  
V. Mag. Carta  
in cap. lxx.  
fol. 151.  
Bract. lib. 3. 157.  
Fleta, lib. 1.  
cap. 20.

## Sect. 74.

**E**T tiel tenant ne pult alien sa terre per fait, car donques le seignior poit entre come en chose forfeit a luy. Mes s'il voit alien sa terre a un auter, il corient solonque ascun custome de surrender les tenements en ascun court, &c. en le maine le seignior, al use celuy que avera le state, en tiel forme, ou a tiel effect.

**A**ND such a tenant may not alien his land by deed, for then the lord may enter as into a thing forfeited unto him. But if he will alien his land to another, it behoveth him after the custome to surrender the tenements in court, &c. into the hands of the lord, to the use of him that shall have the estate, in this forme, or to this effect.

Ad hanc curiam venit A. de B. et sursum reddidit in eadem curia unum mesuagium, &c. in manus domini, ad usum C. de D. et hæredum suorum, vel hæredum de corpore suo exeuntium, vel pro termino vitæ suæ, &c. Et super hoc venit prædictus C. de D. et cepit de domino in eadem curia mesuagium prædictum, &c. Habendum et tenendum sibi et hæredibus suis, vel sibi et hæredibus de corpore suo exeuntibus, vel sibi ad terminum vitæ, &c. ad voluntatem domini, secundum consuetudinem manerii, faciendo et reddendo inde redditus, servitia, et consuetudines inde prius debita et consueta, &c. et dat domino pro fine, &c. et fecit domino fidelitatem, &c.

A. of B. commeth into this court, and surrendreth in the same court a mease, &c. into the hands of the lord, to the use of C. of D. and his heires, or the heires issuing of his body, or for terme of life, &c. And upon that commeth the aforesaid C. of D. and taketh of the lord in the same court the aforesaid mease, &c. To have and to hold to him and to his heires, or to him and to his heires, issuing of his body, or to him for terme of life, at the lord's will, after the custome of the manor, to do and yeeld therefore the rents, services, and customes thereof before due and accustomed, &c. and giveth the lord for a fine, &c. and maketh unto the lord his fealty, &c.

(1. Ro. Abr. 509.)  
Lib. instrat. 151.  
4 Co. 25. b.  
inter Kite &  
Queston.

“**E**T tiel tenant ne fuit aliener sa terre, &c.” And this is true in case of alienation (1), but when a man hath but a right to a copihold, he may release it by deed or by copie, to one that is admitted tenant *de facto* (2). [59. a.]

¶ *Alien per fait.* Here it appeareth by *Littleton*, that there must be an alienation; for the making of the deed alone, unlesse somewhat passe thereby, is no forfeiture. As if he make a charter of feoffment, or a deed of demise for life, and make no livery, this is no forfeiture, because nothing passeth, and therefore no alienation (3); but otherwise it is of a lease for yeares (4).

“*Forfeit a luy.*” This adjective in *Latine* is *foriafactus*, the verbe is *foriafacere*, and the nowne *foriafactura*. They are all derived of *foris*, (that is) *extra*, and *facere*, *quasi diceret, extra legem seu consuetudinem facere*, to do a thing against or without law or custome; and that legally is called a forfeiture. *Littleton* useth this word but once in all his booke. What shall be said [k] forfeitures of copiholds you may read at large in my Reports (5).

“*En aucun court.*” [l] This is the generall custome of the realme, that every copiholder may surrender in court, and need not to alleage any custome therefore. So if out of court he surrender to the lord himselfe, he need not alledge in pleading any custome. But if he surrender out of court into the hands of the lord by the hands of two or three, &c. copiholders, or by the hands of the bayliffe or reeve, &c. or out of court by the hand of any other, these customes are particular, and therefore he must plead them (6). (1. Ro. Abr. 500 9. Co. 76.)

[m] *Bracton*, lib. 4. fol. 209. speaking of these kind of customary tenants, saith, *Dare autem non possunt tenementa sua, nec ex causâ donationis ad alios transferre non magis quàm villani furi; et unde si transferre debeant, restituant ea domino vel balivo, et ipsi ea iradant aliis in villenagium tenenda.* But although it be incident to the estate of a copihold to passe, as our author saith, by surrenders, [b] yet so forcible is custome, that by it a freehold and inheritance may also passe by surrender (1) (without the leave of the lord) in his court, and be delivered over by the bailly to the feoffee, according to the forme of the deed, to be inrolled in the court or the like. [59. b.]

“*Ad hanc curiam venit A. de B. et sursum reddidit, &c.*” Here *Littleton* putteth an example of a surrender in court, and in this example three [c] things are to be observed.

First; that the surrender to the lord be generall without expressing of any estate (2), for that he is but an instrument to admit *Cesty a que use*, for no more passeth to the lord, but to serve the limitation of the use (3); and *Ce' que use*, when he is admitted, shall be in by him that made the surrender, and not by the lord (4).

Secondly,

[k] 4. Co. inter les  
copihold cases 21.  
23. 25. 27. 28. 3. Co.  
92. 90. 100.  
9. Co. 75. 107.  
10 Co. 151.  
[l] Bract. lib. 2.  
cap. 8. & lib. 4.  
40. 16 H. 4. 34.  
1 H. 6. 11.  
(1. Ro. Abr. 500.  
9 Co. 76.)

[m] Bract. lib. 4.  
fol. 209. &  
lib. 2. cap. 8. ac.  
14 H. 4. 34.

[b] *Coram rege*  
Mich. 31 E. 3.  
*Ranulph Hunting-*  
*field's case.*  
3 E. 3.  
*Corona* 310.  
11 H. 4. 83.  
*per Thoring.*

[c] Vide 4. Co.  
inter les cases de  
copiholds.

- (1) [See Note 395.]  
(2) [See Note 396.]  
(3) [See Note 397.]  
(4) [See Note 398.]  
(5) See also tit. *Coppyhold*, in Vin. Abr. D.  
c. to E. d. 2. New Abr. L. and Com. Dig. M.  
(6) [See Note 399.]

- [59. b.]  
(1) [See Note 400.]  
(2) [See Note 401.]  
(3) [See post. 62. a. and Jefferies's case  
cited from Wils. in note 1.]  
(4) Acc. by Wilmot justice in 4 Burr. vol.  
3. p. 1543. and see further as to this Yelv. 223.  
4. Co. 27. b. Com. Dig. *Coppyhold*, F. 14. and  
Gilb. Ten. 3d Lond. ed. 257.

Secondly, if the limitation of the use be generall, then *Ce' que use* taketh but an estate for life, and therefore here *Littleton* expresseth upon the declaration of the use, the limitation of the estate; viz. in fee simple, fee taile, &c.

Thirdly, the lord cannot grant a larger [d] estate then is expressed in the limitation of the use. *Littleton* here putteth his case of one. If two joyntenants be of copihold lands in fee, and the one out of court according to the custome surrender his part to the lord's hands, to the use of his last will, and by his will deviseth his part to a stranger in fee, and dyeth, and at the next court the surrender is presented, by the surrender and presentment the joynture is severed, and the devisee ought to be admitted to the moitie of the lands, for now by relation the state of the land was bound by the surrender (5).

"*In manus domini.*" *Dominus manerii*, the lord of a manor, is described [e] by *Fleta* as he ought to be, in these words. *In omnibus autem et supra omnia decet quemlibet dominum verbis esse veracem, et in operibus fidelem, Deum et justitiam amantem, fraudem et peccatum, odientem, voluntariosque, malevolos, et injuriosos contemnentem, et apud proximos pietatem vultumque motibilem et plenum, ipsius enim interest potius consilio quam viribus uti, proprio et arbitrio. Non consuevit voluntarius juvenis menestrali, vel adulatori, sed jurisperitorum virorum fidelium et honestorum, et in pluribus expertorum, consilio debet favere. Qui bene sibi vult disponere et familie sue, scire veram executionem terrarum suarum necessarium erit, ut perinde sciat quantitatem suarum facultatum et finem annuarum expensarum.* And the residue is fit for every lord of a manor to know and follow, which were too long here to be recited; only his conclusion having spoken of the lord's revenue and expences, I will adde, *Qua omnia distincte scribantur in membranis, ut perinde sagacius vitam suam disponat et facilius convincat mendacia compositiorum.*

[f] If the lord of the manor for the time being be lessee for life or for yeares, gardian, or any that hath any particular interest, or tenant at will of a manor, (all of which are accounted in law *domini pro tempore*) and doe take a surrender into his hands, and before admittance the lessee for life dyeth, or the yeare's interest or custody doe end or determine, or the will is determined, though the lord commeth in above the lease for life or for yeares, the custody or other particular interest or tenancy at will, yet shall he be compelled (6) to make admittance according to the surrender; and so was it holden in 17 *Eliz.* in the earl of *Arundel's* case, which I my self heard.

"*Et dat domino de fine.*" For the signification of this word (*finis*), Vide Sect. 174. 182. 194. 441.

Of fines due to the lord by the copiholder, some be by the change or alteration of the lord (7), and some by the change or alteration of the tenant. The change of the lord ought to be by the act of God, otherwise no fine can be due; but by the change of the tenant either by the act of God, or by the act of the party, a fine may be due: for if the lord doe alledge a custome within his manor to have a fine of every

[d] Mich. 2. & 3. Ph. & M. in Com. Banco, by the whole court in Constable's case of Pickenham in Norfolk.

[e] *Fleta*, lib. 2. c. 65. & 71.

[f] See more of this 4. Co. the cases of copiholds. Trin. 1. Ja. Rot. 854. inter Shapland & Ridler in repl. in Com. Banco, the case of the gardian in socageadjudged. (Cro. Jam. 98. 6. Co. 60. b.)

(5) M. 3. Jac. B. R. Crook n. 30 Porter and Porter. Hal. MSS.—See Cro. Jam. 100. by which the case appears to have been adjudged according to lord Coke's doctrine of relation. See further as to the relation of

Surrenders in Vin. Abr. Copyhold, T. b.

(6) [See Note 402.]

(7) Vid. for tallages in Wales on change of the lord, 34 H. 8. c. 26. Hal. MSS.—See Sect. 93.

every of his copiholders of the said manor at the alteration or change of the lord of the manor, be it by alienation, demise, death, or otherwise; this is a custome against the law, as to the alteration or change of the lord by the act of the party, for by that meanes the copiholders may be oppressed by multitude of fines, by the act of the lord. But when the change groweth by the act of God, there the custome is good as by the death of the lord. And this, upon a case in the chancery [*g*] referred to sir *John Popham* chiefe justice, and upon conference with *Anderson, Periam, Walmesley*, and all the judges of *Serjeants Inn in Fleetstreet*, was resolved, and so certified into the chancery. But upon the change or alteration of the tenant (8), a fine is due unto the lord.

Of fines taken of copiholders some be certaine by custome, and some be incertaine, but that fine, though it be *incertus*, yet must it be *rationabilis*. And that reasonableness shall be discussed by the justices upon the true circumstances of the case appearing unto them; and if the court where the cause dependeth, adjudgeth the fine exacted unreasonable, then is not the copiholder compellable to pay it (1). And so was it adjudged: [*h*] for all excessive- [60. a.] ness is abhorred in law. See more concerning fines of copiholders in my Reports [*i*], which are so plainly there set downe, as they need not be rehearsed here.

[*g*] T. 20 Edm. bew  
sworne the copiholders of the manor of Gailtins in the county of Northumberland, and *Armstrong* lord of the manor, in chancery.  
(11. Co. 44. a.  
Cro. Cha. 190.  
2. Ro. Abr. 578.)

[*h*] Pasch.  
1. Jac. in com. banco rot. 1845. inter *Stallion & Brady*.  
[*i*] 4. Co. the cases of copiholds.

### Sect. 75.

**E**T tiels tenants sont appellez tenants per copie de court rolle; par ceo que ils n'ont auter evidence concernant lour tenements, forsque les copies des rolles de court.

**A**ND these tenants are called tenants by copie of court rolle; because they have no other evidence concerning their tenements, but only the copies of court rolles.

(4. Co. 26.)

“**I**LS n'ont auter evidence.” This is to be understood of evidences of alienation; for a release of a right by deed a copiholder (that commeth in by way of admittance) may have, and that is sufficient to extinguish the right of the copihold, which he that maketh the release had (2).

### Sect. 76.

**E**T tiels tenants ne empleront, ne serront empledes de lour tenements per briefe le roy. Mes s'ils voient empler auters par lour tenements, ils averont un plaint fait en le court le seignor en tiel forme, ou a tiel effect: *A. de B. queritur versus C. de D. de placito terræ, videlicet, de uno mesuagio, quadraginta acris terr'*,

**A**ND such tenants shall neither implead, nor be impleaded for their tenements by the king's writ. But if they will impleade others for their tenements, they shall have a plaint entered in the lord's court in this forme, or to this effect: *A. of B. complaines against C. of D. of a plea of land, viz. of one messuage, forty*

(8). [See Note 403.]

[60. a.]  
(1) [See Note 404.]  
(2) [See Note 405.]



terr', quatuor acris prati, &c. cum pertin'. et facit protestationem sequi querelam istam in natura brevis domini regis assise mortis antecessoris ad communem legem, vel brevis domini regis assise nove disseisine ad communem legem, aut in natura brevis de forma donationis in discender ad communem legem, ou en nature d'ascun autre briefe, &c. Plegii de proseguendo F. G. &c.

forty acres of land, four acres of meadow, &c. with the appurtenances, and makes protestation to follow this complaint in the nature of the king's writ of assise of mordan- ceester at the common law, or of an assise of novel disseisin, or formedon in the discender at the common law, or in the nature of any other writ, &c. Pledges to prosecute F. G. &c.

**T**IELS tenants ne empledoront, ne serront empledés, &c." This is evident, and needs no explanation.

4 H. 4. 34. adjudged in parliament.

"*Mes s'ils voient empledor auters, ils averont, &c.*" Put the case that the demandant in a plaint in nature of a reall action recovereth the land erroneously, what remedy for the party grieved? For he cannot have the king's writ of false judgement in respect of the baseness of the estate and tenure, being in the eye of the law but a tenant at will. And the freehold being in another, he shall have a petition to the lord in the nature of a writ of false judgement, and therein assigne errors, and have remedy according to law.

14 H. 4. 34.  
1 H. 5. 11.  
Vet. N. B. 18.  
13 R. 2. tit.  
Faux judgment.  
7 E. 4. 19.  
21 E. 4. 80.  
(4 Co. 21. b.)

"*De formâ donationis in discender ad communem legem.*" By the opinion of Littleton, as there may be an estate tail by custome with the co-operation of the statute of W. 2. cap. 1. so may he have a *formedon in discender*; but as the statute without a custome extend-  
[60. b.] eth not to copiholds (3), so a custome without the statute cannot create an estate tayle. Now it is not a sufficient proofe, that lands have been granted in tail; for albeit lands have anciently and usually been granted by copie to many men and to the heires of their bodies, that may be a fee simple conditionall, as it was at the common law. But if a remainder have been limited over such estates and enjoyed, or if the issues in tail have avoided the alienation of the ancestor, or if they have recovered the same in writs of *formedon* in the discender, these and such like be proofes of an estate tail. [y] But if by custome copihold may be intailed, the same by like custome by surrender may be cut off (1); and so hath it been adjudged. [z] Some have holden that there was a *formedon* in the discender at the common law (2).

3. Co. 2. 9. in Heydon's case.  
4. Co. 22. 23.  
15 H. 8. Br. tit. Taille.  
(3. Co. 2. b.)  
1. Ro. Abr. 838.)

(1. Ro. Abr. 500.  
1. Sid. 267. 314.  
Cro. Eliz. 717.)

[y] P. 30 Eliz. inter Hill. & Upcheie.  
Custome deins le manor de Overhale in Essex.  
21 Eliz.

Dier 246. 23 Eliz. Dier 373. [x] 10 E. 2. Formdon 55. 21 E. 3. 47. Pl. Com. 240. 4 E. 2. Formdon 80.

## Sect. 77.

**E**T coment que ascun tiels tenants ont inheritance solonque le custome del manor, uncore ils n'ont estate forsque

**A**ND although that some such tenants have an inheritance according to the custome of the manor, yet

(3) [See Note 406.]  
[60. b.]

(1) [See Note 407.]

(2) See further as to intails of copyhold in Vin. Abr. Copyhold, F. E. G. c.

*forsque a volunt le seignior solonque le course del common ley. Car il est dit, si le seignior eux ousta, ils n'ont auter remedy forsque de suer a lour seigniors per petition; car s'ils avertont auter remedie, ils ne serront dits tenants a volunt le seignior solonque le custome del manor. Mes le seignior ne voile enfreindre le custome que est reasonable en tiels cās (3).*

*Mes Brian chiefe justice dit, que son opinion ad touls foils este, et unques serra, si tiel tenant per le custome payant ses services soit eject per le seignior, que il avera action de trespass vers luy. H. 21 Ed. 4. Et issint fuit l'opinion de Danby chiefe justice, M. 7 Ed. 4. Car il dit, que le tenant per le custome est cibien enheritor de aver son terre solonque le custome, come cestuy que ad franktenement al common ley.*

yet they have but an estate but at the will of the lord according to the course of the common law. For it is said, that if the lord doe oust them, they have no other remedy but to sue to their lords by petition; for if they should have any other remedy, they should not be said to be tenants at will of the lord according to the custome of the manor. But the lord cannot breake the custome which is reasonable in these cases.

But Brian chiefe justice said, that his opinion hath alwaies been, and ever shall be, that if such tenant by custome paying his services be ejected by the lord, he shall have an action of trespass against him. H. 21 Ed. 4. And so was the opinion of Danby chiefe justice in 7 Ed. 4. For he saith, that tenant by the custome is as well inheritour to have his land according to the custome, as he which hath a freehold at the common law (1).

13 E. 3. tit. Prescript. 10.  
13 R. 2. flux. judgement 7.  
32 H. 6. tit. Subpœna 2.  
7 E. 4. 10.

Vide Sect. 81.  
82. 84. 132.

[4] Vid.  
43 E. 3. 26.  
Brit. fol. 165.

“*CAR (il est dit) que si le seignior, &c.*” And here Littleton saith truly that it is said so, for so it is said in 13 E. 3. 13 R. 2. 32 H. 6. and 7 E. 4. 19.

But he setteth not downe his owne opinion, but rather to the contrary, as hereafter in this Chapter appeareth. But now *magistrorum experientia* hath made this clear and without question, that the lord cannot at his pleasure put out the lawful coppiholder without some cause of forfeiture, and if he do, the coppiholder may have an action of trespass against him; for albeit he is *tenens ad voluntatem domini*, yet it is *secundum consuetudinem manerii* (4).

[b] And Britton speaking of these kinde of tenants saith thus: *Et ceux sont privileges en tiel maner, que nul de les doit ouster de tiels tenements, tant come ilz sont les services que a lour tenements appendent, ne nul ne poet lour services acrestre ne change a faire autres services ou plus.* And herewith agreeth sir Robert Danby, chiefe justice of the court of common pleas. M. 7 E. 4. 19. and sir Thomas Brian his successor, M. 21. E. 4. 80. viz. that the copyholder doing his customes and services, if he be put out by his lord, he shall have an action of trespass against him. [61. a.]

(1) This must be understood with exception of such copyholds, as by the custom are grantable for life only.

(3) What follows in this Section is neither

in L. & M.—Boh.—nor P.—The addition first appears in Redm.

(4) [See Note 408.]

## CHAP. 10.

## Tenant per le Verge.

## Sect. 78.

**T**ENANTS per le verge sont en tiel nature come tenants per le copy de court roll. Mes la cause par que ils sont appellees tenants per le verge, est, pur ceo que quant ils voient surrender leur tenements en le main leur seignior al use d'un auter, ils averont un petite verge (per le custome) en leur main, le quel ils bailleront al seneschall ou al bailife solonque le custome et use del manor, et celui que avera la terre prendra mesme la terre en le court, et son prisel serra enter en le roll, et le seneschal ou le bailife solonque le custome delivra a celui que prist la terre mesme le verge, ou un auter verge, en nosme del seisin; et par cel cause ils sont appellees tenants per le verge, mes ils n'ont auter evidence sinon per copy de court roll.

**T**ENANTS by the verge are in the same nature as tenants by copy of court roll. But the reason why they be called tenants by the verge, is, for that when they will surrender their tenements into the hands of their lord to the use of another, they shall have a little rod (by the custome) in their hand, the which they shall deliver to the steward or to the bailife according to the custome of the manor, and he which shall have the land shall take up the same land in court, and his taking shall be entred upon the roll, and the steward or bailife according to the custome shall deliver to him that taketh the land the same rod, or another rod, in the name of seisin; and for this cause they are called tenants by the verge, but they have no other evidence but by copy of court roll.

**"TENANTS per le verge."** This tenant *per le verge* is a meere copholder, and taketh his name of the ceremony of the verge (2). Tenure in villenage, or by base tenure, is thus described by Britton: [a] Villenage est tenure de demeines de chescun seigneur baïlle, a tener a son volunt per villeines services de enprover al oſes le seignior, et liverie per verge et nient per tittle de escrit, ne per succession de heritage, dont garda de mariage ne auters services reals, come homage et reliefs, ne poient des amones de demeines ne de villenage este demand.

14 H. 4. 33.  
(Cro. Cha. 397.)

[a] Britton,  
fol. 165. a.  
F. N. B. fol. 12.  
Liberatio per  
Virgam.

**"A le seneschal"** (which we call a steward). *Seneschallus* is derived of *sein*, a house or place, and *schalc*, an officer or governor. Some say that *sen* is an ancient word for justice, so as *seneschall* should signifie *officiarius justitiæ*; and some say that steward is derived of *stewe* (that is) a place, and *ward*, that signifieth a keeper, warden, or governor; and others, that it is derived of *stede*, that signifieth a place also, and *ward*, as it were the keeper or governor of that place.

[61. b.] But it is a word of many significations. In this place it signifieth an officer of justice, viz. a keeper of courts; &c. *Fleta* describeth the office and duty of this officer, at large most excellently: *Provideat tibi dominus de seneschallo circumſpecto et fidei, viro provido et discreto et gratioso, humili, iudico, pacifico, et modesto, qui in legibus consuetudinibusque provincie et officio seneschalciæ se cognoscat, et jura domini sui in omnibus teneri affectet, quique subballivos domini in suis erroribus et ambiguis sciati instruere et docere,*

Vide Sect. 92. &  
379. *Fleta*, lib. 1.  
cap. 66. Vide stat.  
tut. de extent.  
maner. 14 E. 1.

(2) [See Note 409.]

*cerc, quique egenis parcere, et qui nec prece vel pretio velit à tramite justitie deviare, et perversè judicare; cujus officium est curias tenere maneriorum; et de subtractionibus consuetudinum, servitorum, reddituum, sectorum ad curiam, mercata, molendina domini et ad visus francplagi aliarumque libertatum domino pertinentium inquirat, &c.* The residue pertaining to his office is worth your reading at large. Every steward of courts is either by deed or without deed (1); for a man may be retained a steward to keepe his court baron and leet also belonging to the manor without deed, and that reteyner shall continue untill he be discharged. The lord of a manor may make admittances out of court and out of the manor also (2), as at large appeareth in my Reports.

Vide 4. Co.  
Cases de Copiholds,  
fb. 26, 27. 30.

## Sect. 79.

**ET** quax en divers seigniories et manors il y ad tiel custome, si tiel tenant, que tient per custome, voloit aliener ses terres ou tenements, il poill surrender ses tenements a le bailly, ou a le reeve, ou a deux probes homes del seigniorie, al use cestuy que atera le terre, d'aver en fee simple, fee taile, ou pur terme de vie, &c. Et tout ceo ils presenteront al prochein court, et donque celui, que atera la terre per copy de court roll, atera mesme la terre solonque l'entent del surrender.

**AND** also in divers lordships and manors there is this custome, viz. if such a tenant, which holdeth by custome, will alien his lands or tenements, he may surrender his tenements to the bailife, or to the reeve, or to two honest men of the same lordship, to the use of him which shall have the land, to have in fee simple, fee taile, or for terme of life &c. And they shall present all this at the next court, and then he, which shall have the land by copy of court roll, shall have the same according to the intent of the surrender.

**"A Le bailie."** This word *bailie*, as some say, commeth of the French word *baylife*, in *Latin ballivus*; but in truth bailie is an old Saxon word, and signifieth a safe keeper or protector, and *baile* or *ballium* is safe keeping or protection: and thereupon we say, when a man upon surety is delivered out of prison, *traditur in ballium*, he is delivered into bayle, that is, into their safe keeping or protection from prison: and the sherife that hath *custodiam comitatûs* is called *ballivus*, and the county *balliva sua*.

Vide Lamb. exposition of Saxon words.

**"Reve"** is derived of the Saxon word *gerefa* or *gereve*; and by contraction or rather corruption *greve*, or *reve*, and is in *Latine prefectus* or *præpositus*. It signifies as much as *aspiruator*, a disposer or director, as wood-reeve, sheepe-reve, shire-reeve, &c. whereof more shall be said hereafter. Vide *Fleta*, lib. 2. cap. 67. where he treateth of the office of the bailife, and cap. 69. *de officio præpositi*, of the office of the reeve, and what belongeth of duty and right to either of them, which words are too long here [62. a.] to be inserted. Only this I will take out of him. *Ballivus autem cujuscunque manerî esse debet in verbo verax, et in opere diligens et fidelis, ac pro discreto aspiruatore cognitus flegiatus et electus, qui de*

*Fleta*, lib. 2. ca. 67.  
& 69.

(1) [See Note 410.]

(2) See ante 59. a. and note 6. there.

*de communioribus legibus pro tanto officio sufficienti se cognoscat, et quod sit ita iustus, quod ob vindictam seu cupiditatem non querat versus tenentes domini nec alios, &c. Præpositus, autem tanquam appruator et cultor optimus, &c. domino vel ejus seneschallo falam debet presentari, cui injungatur officium illud indilate. Non ergo sit piger aut somnolentus, sed efficaciter et continue commodum domini adipsi nitatur et exarare, &c.* the residue concerning both the offices being worthy your reading.

“*A le bailie ou le reeve.*” Littleton intendeth into the hands of the lord by the hands of the bailiffe or the reeve.

“*Ou al deux probes homes del seignorie.*” The custome doth guide these surrenders out of court, and the custome must be pursued.

Vol. 4. Co. 25.  
Kite and Quaintin's case.

“*Et tout ceo ils presenteront al prochine court, &c.*” By the surrender out of court, the copihold estate passeth to the lord under a secret condition, that it be presented at the next court according to the custome of the mannor. And therefore if after such a surrender, and before the next court, he that made the surrender dieth, yet the surrender standeth good (1); and if it be presented at the next court, *Ce' que use* shall be admitted thereunto; but if it be not presented at the next court according to the custome, then the surrender becometh void (2); and so was it cleerly holden *Pasch. 14 Eliz.* in the court of common pleas, which I my selfe heard.

(4. Co. 39. B)

## Sect. 80.

**E**T issint est ascavoïre, que en divers seignories, et divers manors, sont plusors et divers customes en tielx cases, quant a prender tenements, et quant a pleder, et quant as autres choses et customes a faire; et tout ceo que n'est pas encounter reason poit bien estre admitte et allow.

**A**ND so it is to be understood, that in divers lordships, and in divers mannors, there be many and divers customes in such cases, as to take tenements, and as to plead, and as to other things and customes to be done; and whatsoever is not against reason may well be admitted and allowed.

“**S**ONT plusors et divers customes.” This was cautiously set downe, for in respect of the variety of the customes in most mannors, it is not possible to set down any certainty, only this incident inseparable every custome must have, viz. that it be consonant to reason, for how long soever it hath continued, if it be against reason, it is of no force in law.

(4. Co. 31. Crp.  
Cha. 330.)

“*Enconter reason.*” This is not to be understood of every unlearned man's reason, but of artificiall and legal reason warranted by authority of law: *Lex est summa ratio.*

(1) [See Note 411.]

(2) See further as to the time of pre-

senting surrenders, Vin. Abr. *Copyhold*, L. a. Com. Dig. *Copyhold*, F. 10.

## Sect. 81.

**ET** tiels tenants que teignent solongue la custome d'un seignorie ou d'un manor, coment que ils ont estate d'enheritance solongue le custome del seigniorie ou manor, uncore pur ceo que ils n'ont aucun frank-tenement per le cours del common ley, ils sont appellees tenants per base tenure.

**AND** these tenants which hold according to the customs of a lordship or manor, albeit they have an estate of inheritance according to the custome of the lordship or manor, yet because they have no freehold by the course [62. b.] of the common law, they are called tenants by base tenure.

"Ils sont appellees tenants per base tenure." Of this sufficient hath been spoken before.

## Sect. 82.

**ET** divers diversities y sont porenter tenant a volunt, que est eins per lease son lessor per le course del common ley, et tenant solongue le custome del manor en le forme avantdit. Car tenant a volunt solongue custom puit aver estate d'enheritance (come est avantdit) al volunt le seignior, solongue le custome et usage del manor. Mes si home ad terres ou tenements, queux ne sont deins tiel manor ou seignorie ou tiel custome. ad este use en le forme avantdit, et voile les-ser tiels terres ou tenements a un autre, a aver et tener a luy et a ses heires a le volunt le lessor, ceux parolx (a les heires de le lessee) sont voids. Car en cest case si le lessee devie, et son heire enter, le lessor avera bon action de trespas envers luy; mes nomy issint envers l'heire le tenant per le custome en aucun cas, &c. pur ceo que le custome de le manor en aucun cas luy puit aide de barrer son seignior en action de trespas, &c.

**AND** there are divers diversities in by lease of his lessor by the course of the common law, and tenant according to the custome of the manor in forme aforesaid. For tenant at will according to the custome may have an estate of inheritance (as is aforesaid) at the will of the lord, according to the custome and usage of the manor. But if a man hath lands or tenements, which be not within such a manor or lordship where such a custome hath beene used in forme aforesaid, and will let such lands or tenements to another, to have and to hold to him and to his heires at the will of the lessor, these words (to the heires of the lessee) are void. For in this case if the lessee dieth, and his heire enter, the lessor shall have a good action of trespas against him; but not so against the heire of tenant by the custome in any case, &c. for that the custome of the manor in some case may aid him to barre his lord in an action of trespas, &c.

"**T**ENANT a volunt solongue le custom puit aver estate d'enheritance, &c." Here note that Littleton alloweth, that by the custome of the manor the copholder hath an inheritance, and consequently the lord cannot put him out without cause.

"Mes

"*Mes si home, &c. voile lesser terres ou tenements a un autre a aver et tener a luy et ses heires a volunt le lessor, ceux parols (a les heires de le lessee) sont voides. Car en cest case si le lessee deuiet, et son heire enter, le lessor avera action de trespasse envers luy, &c.* By which it is proved, that by the death of the lessee the lease is absolutely determined; which is proved by this, that if the heire enter the lessor shall have an action of trespass, *quare vi et armis*, before any entry made by the lessor.

10 E. 4. 18.  
23 E. 4. 13.  
2 R. 2. barre 237.  
11 H. 7. 23.  
21 H. 7. 12.

[68. a.] "*Pur eco que le custome de le manor en ascun case luy fuit aider de barrer son seignior en action de trespasse, &c.*" Hereby it appeareth, that by the opinion of *Littleton* the lord against the custome of the manor cannot oust the copholder.

## Sect. 83.

**ITEM**, l'un tenant per le custome en ascuns lieux doit repaier et susteiner ses measons, et l'auter tenunt a volunt nemy.

**ALSO**, the one tenant by the custome in some places ought to repaire and uphold his houses, and the other tenant at will ought not.

"**P**ER le custome." For what a copholder may or ought to doe, or not doe, the custome of the manor [a] must direct it, for *consuetudo manerii est observanda*. [b] But if there be no custome to the contrary, wast either permissive (1) or voluntary of a copholder is a forfeiture of his cophold (2).

[a] Bracton, lib. 2. fol. 76.  
[b] Vid. 4. Co. 21, 22, &c. in Cases de Copholds.

## Sect. 84.

**ITEM**, l'un tenant per le custome ferra fealtie, et l'auter nemy. Et plusors autres diversities y sont perentier eux.

**ALSO**, the one tenant by the custome shall do fealty, and the other not. And many other diversities there be betweene them.

"**L'**UN, tenant per le custome ferra fealtie, et l'auter nemy." And the doing of fealty by a copholder, proveth that a copholder, so long as he observes the custome of the manor and payeth his services, hath a fixed estate. For tenant at will, that may be put out at pleasure, shall not doe fealty. For to what end should a man sweare to be faithful and true to his lord, and should beare faith to him which he claimeth to hold of him, and that lawfully he shall doe his customes and services, &c. when he hath no certaine estate, but may be put out at the pleasure of the lessor, or he himselfe may determine it at his pleasure. Of these kind of customary tenants, and of many things concerning them, you may read more in the Fourth

Vide Sect. 132.

(Post. 28. b.).

Booke

(1) [See Note 412.]

(2) [See Note 413.]

4 Co. 21, 22,  
23, &c.

Booke of my Reports, fol. 21, 22, 23, &c. Thus much, as I have here set downe, may suffice, for the understanding of such cases and opinions as *Littleton* hath expressed (3).

*Finis Libri Primī.*

(3) See further on the subject of *copyhold* estates *Kitchin on Courts*, *Coke's Copyholder and the Supplement*, the book intitled the *Survivor's Dialogue*, *Calthorp's* reading on *Lord and Copyholder*, *Hughes*

on *Original Writs* 247. to 259. the title *Copyhold* in the *Abridgements*, the *Lex Cusumaria*, and the several other treatises on *copyhold* law, particularly those by *Shepherd and Nelson*.



## SECOND BOOK

OF THE

## FIRST PART

OF THE

## INSTITUTES

OF THE

## LAWS OF ENGLAND.

Chap. I.

Homage.

Sect. 85.

**H**OMAGE est le plus honorable service, et plus humble service de reverence, que franktenant puit faire a son seignior. Car quant le tenant ferra homage a son seignior, il serra discinct, et son test discover, et son seignior seera, et le tenant genuera devant luy sur ambideux genues, et tiendra ses maines extendes et joyntes ensemble enter les maines le seignior, et issint dirra: Jeo deveigne vostre home (1) de cest jour en avant de vie et de member, et de terrene honor (2), et a vous serra foiall et loiall, et foy a vous portera des tenements que jeo claiue de tener de vous, salve la foy que jeo doy a nostre seignior le roy; et donques le seignior issint seyant luy basera.

**H**OMAGE is the most honorable service, and most humble service of reverence, that a franktenant may do to his lord. For when the tenant shall make homage to his lord, he shall be ungirt, and his head uncovered, and his lord shall sit, and the tenant shall kneele before him on both his knees, and hold his hands joyntly together betweene the hands of his lord, and shall say thus: I become your man from this day forward of life and limbe, and of earthly worship, and unto you shall be true and faithfull, and beare to you faith for the tenements that I claime to hold of you, saving the faith that I owe unto our soveraigne lord the king; and then the lord so sitting shall kisse him (3).

**O**UR author having taught us in his former booke the several distinct estates of lands and tenements as most necessary to be known, for the understanding of these two other bookes, doth in this second book treat of the tenures (1) and services whereby the said lands

(1) [See Note 1.]

[64. b.]

(1) [See Note 2.]

(2) The words *de vie et membre et de terrene honor* are not in L. and M. but the

Roh. and subsequent editions have them.

(3) Vid. in Rot. Parl. 18 H. 6. n. 58. a special act of parliament to excuse the kissing in the case of homage made to the king by reason of pestilence. Hal. MSS.

(4 Co. 8. a  
Devil's case.)

lands and tenements be holden ; which he divideth into twelve parts, viz. *Homage, Fealty, Escuage, Knight Service, Socage, Frankalmoigne, Homage Auncestrell, Grand Serjeanty, Petit Serjeanty, Tenure in Burgage, in Villenage*, and into *Rents*. Wherein his method is most excellent ; for he beginneth with *Homage*, because it is the most humble service of reverence, expressing the duty of the tenant to his lord, and the affectionate love and protection of the lord towards his tenant, as hereafter shall appeare. Secondly, *Fealty*, a sacred service, expressing by oath his fidelity to his lord. [64. b.]

Thirdly, *Escuage* which is *servitium scuti*, the service of the shield.

Fourthly, *Knights service*, for the defence of the realme against outward hostility and invasions, which the better might be effected, if such duty fidelity and love were betweene lords and tenants, as ought to be, and as the law expecteth.

Fifthly, *Socage*, the service of the plough, aptly placed next knights service, for that the ploughman maketh the best souldier, as shall appeare in his proper place.

Sixtly, *Frankalmoigne*, service due to Almighty God, placed towards the middest for two causes : first, for that the middest is the most worthy and most honourable place : and secondly, because the first five preceding tenures and services, and the other sixe subsequent, must all become prosperous and usefull, by reason of God's true religion and service ; for *Nunquam prosperè succedunt res humane, ubi negliguntur divina*. Wherein I would have our student follow the advice given in these auncient verses, for the good spending of the day ;

*Sex horas somno, totidem des legibus aquis.*

*Quatuor orabis, des epulisque duas.*

*Quod superest ultro sacris largire camenis.*

Seventhly, *Homage auncestrell*, ancient families enjoying, with their blood, the ancient inheritance of their forefathers, as a great blessing of the Almighty.

8. and 9. *Serjeanty grand et petit*, due to the king only, to whom the highest and most eminent honor, ligeance, and reverence of all kinde is due ; which hath two notable effects. First, *imperii majestas est tutela salua*, according to the old rule ; and secondly, it is an assured means of long continuance of houses and families in prosperous estate, whereof our author speaketh in the Chapter before.

10. Then followeth the tenure of *Burgage*, of ancient burghes and cities, &c. which are to be supported for the honour of the king, and for the maintenance of trade and traffique, the life of all commonwealths, especially of islands.

11. *Villenage*, for the performance of service, yet necessary service for the clensing of cities, boroughes, mannors, &c. and for the better manuring of arrable grounds, and increase of husbandry.

12. And lastly, tenure by *rents*, which are called *vivi redditus*, because the lords and owners thereof do live by them ; which they shall enjoy the better, if trade and traffique be maintained, and our native commodities, which are rich and necessary, holden up and saleable at a reasonable value. And now understanding his method, let us peruse our author's words.

And

And as our author beganne his first booke with fee simple, which is the most principall and worthiest estate, so he beginneth his second booke with homage, which is the most honourable and humble service.

"Homage," is derived of [a] *homo*; and it is called *homage*, because when he doth this service, he saith, *Jeo deveigne vostre home*. And in English homage is called manhood, so as the manhood of his tenant and the homage of his tenant is all one. *Mutua quidem debet esse domini et homagii fidelitatis connexio, ita quodd quantum homo debet domino ex homagio, tantum illi debet dominus ex dominio præter solam reverentiam.*

[a] Glanvil.  
li. 9. ca. 1.  
Bract. fa. 78. 80.  
Brit. fo. 170.  
172, 173.  
Flet. li. 3. c. 16.  
Mir. c. 3. de  
Homage, et l. 5.  
sect. 1.

"Foyal et loyal." These words are of great extent, for they extend to the observation of the lord's counsell in whatsoever is honest and profitable. [b] *Omnia homo debet fidem domino suo de viâ et membris suis, et terreno honore, et observatione consilii sui per honestum et utile* (comprehended under these words *foyal et loyal*) *salvâ fide Deo et terræ principi.*

[b] Lib. Rub.  
ca. 56.

[65. a.] "Service." [c] *Servitium in lege Angliæ regulariter accipitur pro servitio, quod per tenentes dominis suis debetur ratione feodi sui.* But *servitium est duplex; spirituale*, whereof more shall be said in the Chapter of Frankalmoigne; *et temporale*, whereof our author here treateth. And he beginneth with homage, first, because it is most honourable, for *honor plus est in honorante, quàm in honorato*. 2. It is *plus humble de reverence*, and both of these for five causes on the part of the tenant. First, the tenant when he doth his homage is *discinctus*, disarmed or unguarded. Secondly, *nudo capite*, bare-headed. Thirdly, *ad pedes domini super genua projectus*. Fourthly, *ambas manus junctas inter manus domini porrigit*. Fifthly, *per verba omni supplicii veneratione plena*, he saith, *Jeo deveigne vostre home, &c.* And for three causes on the part of the lord. First, the lord doth sit. Secondly, he incloseth his tenants hands betweene his owne. Thirdly, the lord sitting kisseth the tenant. Prudent antiquity did, for the more solemnity and better memory and observation of that which is to bee done, expresse substances under ceremonies.

[c] 2 H. 4. 6.

Glanvil. et Mir.  
ubi supra.

*Nil sine prudenti fecit ratione vetustas.*

"*Jeo deveigne vostre home de vie et de member.*" And therefore he is *discinctus*, for that he must never be armed against, or opposite to his lord, but both life and member must be ready for the lawfull defence of his lord.

Bract. fol. 80.  
Britton, fol. 173. b.  
ac. Fleta, lib. 3.  
cap. 16.

2. "*De terrene honor.* Expressed by kneeling at the feet of his lord.

3. *Debet quidem tenens manus suas utrasque ponere inter manus utrasque domini sui, per quod significatur ex parte domini protectio defensio et warrantia, et ex parte tenentis reverentia et subjectio.* So as the holding up of the tenant's hands betokeneth reverence and subjection, and the lord's inclosing of his tenant's hands between his owne betokeneth protection and defence.

4. "*De*

4. "*Et a vous serra foyal et loyal, et foy a vous portera, &c.*" This faith, *fide* s, or *sedus perpetuum*, this perpetuall league between the lord and the tenant is expressed by the lord's kissing of the tenant. And some say, that *sedus dicitur à fide, quia fides interponitur*. And so firme and strong was this league between them, that by the ancient law of England, *nilil facere potest tenens propter obligationem homagii, quod vertatur domino ad exheredationem, vel allam atrocem injuriam. Nec dominus tenenti è converso. Quod si fecerint, dissolvitur et extinguatur homagium omnino et homagii connectio et obligatio, et erit inde justum judicium cum venerit contra homagium et fidelitatis sacramentum, quodd in eo in quo delinquant puniantur, s. in personâ domini, quodd amittat dominum, et in personâ tenentis, quodd amittat tenementum.*

Bract. ubi supra.  
Brit. fol. 174.

"*Des tenements queux jeo claime a tener de vous.*" Britton saith, that [a] in doing of homage he must name the lands or tenements for which he doth homage in certaintie; and the reason is, *ne in captione homagii contingat dominum per negligentiam decipi vel per errorem.*

[a] Brit. ubi supra.  
Bract. ubi supra.  
Glanvil. lib. 5.  
cap. 1.  
Mir. cap. 3. de Homage.

For the better understanding of that which shall be said hereafter, it is to be knowne, that first, there is no land in England in the hands of any subject (as it hath been said) but it is holden of some lord by some kind of service, as partly hath been touched before (1).

[b] 10 E. 3. 36.  
44 E. 3. 5.  
48 E. 3. 9.  
6 H. 7. 12.

Secondly, all the lands [b] within this realme were originally derived from the crowne, and therefore the king is sovereigne lord, or lord paramount, either mediate or immediate of all and every parcell of land within the realme (2).

Thirdly, that in ancient time lords upon the creation of their tenures did not onely reserve rents, services, and profit, &c. for which they might distreine and have other remedy, but also tooke an humble submission of his tenant by promise and oath (for to homage fealty is incident), to be true and faithfull to him for the tenements holden of him, which submission is called homage and fealty, according to the tenure reserved.

Glanvil. lib. 9. c. 1.  
Mir. c. 3. de Fealty.  
Bract. ubi supra.  
Brit. ubi supra.  
Inter Inquis.  
apud Lancaster.  
anno 6 E. 1.  
Cornub. in Thes.

"*Salve le foy que jeo doy a nostre seignior le roy.*" Both because there is *homagium ligeum*, which is due to the king onely, and also because he is sovereigne lord over all (3).

I have seene an ancient record in Anno 6. Edw. 1. in these words. *Michael de North, qui sequitur pro rege, queritur, quodd cum dominus rex ratione regie dignitatis et corone sue tale habeat privilegium quodd nullus in regno suo de aliquo qui sit in regno Anglie alicui homagium facere debeat, vel aliquis hujusmodi homagium ab aliquo recipere debeat, nisi factâ mentione de homagio domino regi debito eidem domino regi fideliter observand' Walterius Exon' episcopus, in contemptu domini regis, et ad manifestam quoad privilegium prædictum ipsius domini regis exheredationem, et ad damnum et dedecus ipsius domini regis ad valentiam decem mill' librarum, de Henrico de Pomeray, Thomâ de Kane', Johanne de Bello Prato, Laurentio filio Ric' Johanne le Soer, Willicmode Alex', Eudone de Tranael, Rogero le Gros, Johanne le Lunge, Rado' de Bevill, Guidone [65. b.] Novant, Willicmo de Rouskerrek, et Hen. Cannel, accepit servitia*

(1) [See Note 3.]

(3) [See Note 4.]

(2) See ante fol. 64. a: note 1. and fol. 1. b.  
note 1

*vitis contra privilegium predict', nulla facta mentione de homagio et fidelitate domino regi debitis.* And judgement in the end was given against the said bishop.

"Roy." Our ancestors the Saxons termed him *Coning* or *Cyning*, a name signifying power and skill, which by way of contraction we now call King. This name the Saxons with a small alteration had from the *Brittaines*, who called him *Koningh* or *Koninke*. In French he is called *Roy*, in *Italian Re*, in *Spanish Rey*, all derived from the *Latine (Rex)*, of the true signification whereof you shall read [d] plentiful matter in our old bookes.

So as homage is divided, first, in *homagium ligeum, et non ligeum* (1).

Second, In *homagium antecessorium, et non antecessorium* (2). It is here necessary to be knowne what tenant, that holdeth by homage, shall do homage. [c] *Item videndum, quis potest homagium facere. Sciendum est, quod quilibet liber homo, tam masculus quam femina, clericus et laicus, major et minor; dum tamen electi in episcopos post consecrationem homagium non faciant, quicquid fecerint ante, sed tantum fidelitatem* (3). *Conventus autem homagium non faciet de jure, sicut nec abbas, nec prior, eo quod tenent nomine alieno, scilicet nomine ecclesiarum.*

[g] One within the age of 21 yeares may doe homage; but *Bracton* saith he cannot doe fealtie, because in doing of fealty he ought to be sworne, which an infant cannot be (4). But some opinions be in our bookes to the contrary, viz. that an infant shall doe fealtie; but I take it to be meant of homage, and herewith [h] agreeth *Britton*, who saith, *et tout soit que enfant deins age fait homage, pur ceo ne volons nous my que il face serement de fealtie, jeaque a taunt que il soit de pleine age; et tout soit ceo comon dit del peuple que fait de enfant fait deins age ne soit fait my a tener estable. Volons neque dent, que chescun home et chescun feme, de quel age que ils soient, facent homage a leur seignieur selonque l'estatut de la grand charter.*

*Glanvill* saith, [i] women shall not do homage; but *Littleton* saith that a woman shall doe homage, but she shall not say, *Jeo deveigne vostre feme*, but *Jeo face à vous homage*; and so is *Glanvill* to be understood, that she shall not doe compleate homage.

[d] *Mirror*, ca. 1. sect. 2. and ca. 2. sect. 1. & 2. *Bract.* lib. 5. fol. 368, 369, 340. *Fleta*, lib. 1. cap. 5. *Fortescue*, cap. 5. and 37. *Stanf.* pl. cor. 98, 99. and *Froter*, 65. [e] *Glanvill*, lib. 9. ca. 1. *Bracton*, fol. 78. b. *Britt.* c. 68. fol. 170, 171. *Fleta*, lib. 3. cap. 16.

[g] *Glanvill*, lib. 9. cap. 1. *Bracton*, lib. 2. fol. 78. *Fleta*, lib. 3. cap. 16. acc. 21 E. 3. 40. 24 E. 3. 63, 64. 32 E. 3. age 80. & tit. per quem servit. 9. 13 H. 4. 3. 33 H. 6. 16. 20 E. 3. per quem servit. 34. [h] *Britton*, fol. 171.

[i] *Glanvill*, lib. 9. c. 1. *F.N.B.* 157. *Regist.* 204. *Britton*, ubi supra. *Mirror*, ca. 1. sect. 3.

## Sect. 86.

**M**ES si ou abbe, ou un pryor, ou autre home de religion, ferra homage a son seignior, il ne dirra, *Jeo deveigne vostre home*, &c. pur ceo que il ad luy professe pur estre tantsollement le home de Dieu. Mes il dirra issint: *Jeo*

**B**UT if an abbot, or a pryor, or other man of religion, shall doe homage to his lord, he shall not say, I become your man, &c. for that he hath professed himselfe to be onely the man of God. But he shall say thus: I doe

(1) See note 3. in 65. a.

(2) That is, *auncestrel* and not *auncestrel*, as to which see post. 109. b.

(3) *Homage done the king by a bishop* salvo

suo ordine. *M. Paris* 101. *Hal. MSS.*—See what is said by lord Coke *infra*.

(4) [See Note 5.]

*Jeo vous face homage, et a vous serra foial et loial, et foy a vous portera des tenements que jeo teigne de vous, salve la foy que jeo doy a nostre seignior le roy.*

I do homage unto you, and to you I shall be true and faithfull, and faith to you beare for the tenements which I hold of you, saving the faith which I doe owe unto our lord the king.

[E] Glanvil. lib. 1. cap. 9. in fine.  
Britton, lib. 2. 72.  
Bracton, cap. 68.  
Fleta, lib. 3. ca. 16.  
[I] Vid. Sect. 86. & 133.

**N**O man of religion when [k] he doth homage shall say, *Jeo deveigne vostre home*; because he hath professed himselfe the man of God; yet shall he doe homage, and shall say, [l] *Jeo face a vous homage, et a vous serra foyall et loyall, &c.* And note, that here religion is taken largely, for it extends not only to regular persons, as abbots and the like, but also to all ecclesiasticall persons, as bishops, deanes, or any other sole ecclesiasticall body politike; and so it is the use at this day, which also appeares in our old books.

And it is to be observed, that in old bookes and records, the homage which a bishop, abbot or other man of religion doth, is called fealty, for that it wanteth these words (*Jeo deveigne vostre home.*) But yet in judgement of law it is homage, because he saith, I doe you homage, &c. and so of a woman.

## Sect. 87.

[66. a.]

**I**TEM, si feme sole ferra homage a son seignior, el ne dirra, *Jeo deveigne vostre feme*; pur ceo que n'est convenient que feme dirra, que il deviendra feme a ascun home, forsque a sa baron, quant el est espouse. Mes el dirra, *Jeo face a vous homage, et a vous serra foial et loial, et foy a vous portera des tenements que jeo teigne de vous, salve la foy que jeo doy a nostre seignior le roy.*

**A**LSO, if a woman sole shall doe homage, she shal not say, I become your woman; for it is not fitting that a woman should say, that she will become a woman to any man, but to her husband, when she is married. But she shall say, I do to you homage, and to you shall be faithfull and true, and faith to you shall bear for the tenements I hold of you, saving the faith I owe to our soveraigne lord the king.

[m] For like reasons ab in convenienti, vid. Sect. 138, 139, 231. 269. 440. 473. 668. 722. 730. 31 M. 7. 13. F. N. B. 230. d. 36 M. 7. 9.

“*Pur ceo que n'est convenient, &c.*” By this it appeareth, [m] that *argumentum ab inconvenienti plurimum valet in lege*, as often shall be observed hereafter. *Non solum quod licet sed quid est conveniens est considerandum. Nihil quod est inconveniens, est licitum* (1).

## Sect. 88. (2.)

**I**TEM, home puit voier un bone note en *M. 15 E. 3.* lou un home et sa seme fierent homage et fealty en le

**A**LSO, a man may see a good note in *M. 15 E. 3.* where a man and his wife did homage and fealtie

(1) [See Note 6.]

(2) In the Rohan edition, and in those of

Pynson and Redman, this Section is transposed to the Chapter of Fealty.

le common banke, quel est escrie en tiel forme. Nota, que I. Leukner et Elizabeth sa feme fierent homage a W. Thorpe en cest maner : l'un et l'autre tiendront jointment lour mains enter les mains W. T. et le baron dit en cest forme : Vous vous ferromus homage, et foy a vous porterons pur les tenemens que nous teignomus de A. votre conusor, que a vous ad graunt nostre services en B. et C. et autres villes, &c. encountre tous gentis, salve la foy que nous devons a nostre seignior le roy, et a ses heires, et a nostre auters seigniors : et l'un et l'autre luy baseront. Et puis ils fierent fealtie, et l'un et l'autre tyendront lour mains sur un livre, et le baron dit les parolx, et ambideux baseront le livre.

fealtie in the common place, which is written in this forme. Note, that I. Leukner and Eliz. his wife did homage to W. Thorpe in this manner: the one and the other held their hands joyntly betweene the hands of W. T. and the husband saith in this forme: We doe to you homage, and faith to you shall beare for the tenements which we hold of A. your conusor, who hath granted to you our services in B. and C. and other townes, &c. against all nations (s), saving the faith which we owe to our lord the king, and to his heires, and to our other lords, and both the one and the other kissed him. And after they did fealtie, and both of them hold their hands upon the booke, and the husband said the words, and both

• kissed the booke.

**I**N this [n] record three things are to be observed.

1. How necessary and profitable records and observations are, albeit they were not published in print; for at the time when *Littleton* wrote, this record was not printed.

2. That the husband and wife doing homage, the husband shall speake the words for them both, viz. We doe to you homage, &c.

3. That the homage which the husband and wife doe, is the very homage which the wife should doe alone. But this joint homage done by the husband and wife, is intended to be before issue had between them, whereof more shall be sayd hereafter. And it is to be observed, that very few cases ruled or resolved in the reigne of *Edward*

[66 b.] the third, but the same or the like had been ruled or resolved in the raignes of *Edward* the second, *Edward* the first, or before, as for example for warrant hereof, *vide* Hill. 17 E. 2. Rot. Parl. &c.

[n] Mich.  
15 E. 3. tit.  
Azwrie 109.

Hill. 17 E. 2.  
Rot. Parl. &c.

## Sect. 89.

**N**OTA, si un home ad several tenancies, queux il tient de several seigniors, scilicet, chescun tenancy, per homage; donque quant il fait homage a un des seigniors, il dira en le fine de son homage fait, Salve la foy que jeo doy a nostre seignior le roy, et a mes auters seigniors (1).

**N**OTE, if a man hath severall tenancies, which he holdeth of severall lords, that is to say, every tenancy by homage; then when he doth homage to one of his lords, he shall say in the end of his homage done, Saving the faith which I owe to our lord the king, and to my other lords.

“ Et

(3) [See Note 7.]

(1) [See Note 3.]

"*Et a mes autres seigneurs.*" This saying for other lords is good for explanation, albeit the homage is referred only to the tenements which he holdeth of him to whom he doth the homage.

## Sect. 90.

**N**OTA, que nul ferra homage mes tiel que ad estate en fee simple, ou en fee taile, et son droit demene, ou en droit d'un autre. Car il est un maxime en ley, que il que ad estate forsque pur terme de vie, ne ferra homage, ne prendra homage. Car si feme ad terres ou tenements en fee simple, ou en fee taile, queux il tient de son seignior per homage, et prent baron, et aut issue, donque le baron en la vie la feme ferra homage (2), pur ceo que il ad title d'avoir les tenements per le curtesie d'Engleterre s'il survives la feme, et auxy il tient en droit de sa feme. Mes si la feme devy devant homage fait per le baron en la vie sa feme, et le baron soy tient eus come tenant per le curtesie, donques il ne ferra homage a son seignior, pur ceo que il adonque n'ad estate forsque pur terme de vie.

Plus serra dit de homage en le tenure per homage auncestrel.

**N**OTE, none shal do homage but such as have an estate in fee simple, or fee taile, in his owne right, or in the right of another. For it is a maxime in law, that he which hath an estate but for terme of life, shal neither do homage or take homage. For if a woman hath lands or tenements in fee simple, or in fee taile, which she holdeth of her lord by homage, and taketh husband, and have issue, then the husband in the life of the wife shal doe homage, because he hath title to have the tenements by the curtesie of England if he surviveth his wife, and also he holdeth in right of his wife. But if the wife dies before homage done by the husband in the life of his wife, and the husband holdeth himselfe in as tenant by the curtesie, then he shall not doe homage to his lord, because he then hath an estate but for terme of life.

More shall be said of homage in the tenure of homage auncestrel.

"**E**N droit d'un autre." As the husband and wife in the right of his wife, the bishop in right of his bishopricke, &c. the abbot or prior in right of his monastery, &c. But no corporation aggregate of many persons capable, [h] be the same ecclesiasticall or temporall, can doe homage, as a deane and chapter, maior and commonalty, and such like, albeit they be seised in fee of lands holden by homage, yet shall not they doe homage. And the reason is, because that homage must be done in person, and a corporation aggregate of many cannot appeare in person; for albeit the bodies naturall, whereupon the body politique consists, may be seene, yet the bodie politique or corporate itselfe cannot be seene, nor doe any act but by attorney, and homage must ever be done in person, &c. (3) And albeit an abbot and covent is a corporation aggregate of many, yet because the covent are all dead persons in [67. a.] law, the abbot alone in nature of a sole corporation shall doe homage.

(a) 33 H. 6. the  
Realitie Br. 16.  
4 Co. 11.  
7 Co. 16.  
10 Co. 31.

" Un

(2) [See Note 9.]

(3) 2. E. 3. 10. Accord. Hal. MSS.



"*Un maxime en ley.*" A maxime is a proposition, to be of all men confessed and granted without proove, argument, or discourse. *Contra negantem principia non est disputandum.* But of this somewhat hath been said before.

"*Il que ad estate forsque pur terme de vie.*" [g] A parson or vicar of a church, that hath a qualified fee, [r] and yet to many intents upon the matter but an estate for life, can neither receive (1) homage nor do homage, as a bishop, an abbot, or any such like, that hath a fee absolute, may. [s] So if a man and his wife be seised in fee of a seigniorie in the right of his wife, the husband shall not receive homage alone, but he and his wife together. [t] But if the husband in that case hath issue by his wife, then he shall receive homage alone during the life of his wife; and the reason is, because he by having of issue is intitled to an estate for terme of his owne life, in his owne right, and yet is seised in fee in the right of his wife, so as he is not a bare tenant for life. But if his wife dye, then he hath onely but an estate for life, and then he cannot receive homage. Yet tenant for life or years of a seigniorie [u] shall have ward, marriage, and reliefe, and shall suppose that the tenant died in the fealty of the pl. [x] *Fieri possunt homagia libero homini tam masculo quam femina, tam majori quam minori, tam clerico quam laico.*

22 E. 3. part. 44. [x] Glanvil. lib. 9. cap. 3. 13 E. 3. 7. 43 E. 3. 13. 44 E. 3. 41. 13 H. 6. Avowrie 21. 8 H. 6. 13. 7 E. 4. 27. F. N. B. 267.

"*Et ount issue, donque le baron en la vie la feme ferra homage.*"

The reason hereof is rendred before, and also that after the death of his wife he being but a bare tenant for life shall doe no homage; for regularly it is true, that he that cannot receive homage in respect of the weaknesse of his estate in the seigniorie, shall not doe homage, if he hath a like estate in the tenancy.

If a man hold of the king, and hath issue divers daughters, and dyeth, the king shall have homage of every one of these daughters. And this [a] appeareth by the statute *De Hibernia* anno 14 H. 3. to be the common law; for that act saith, *In regno nostro Anglia talia est lex et consuetudo, quod si quis tenueris de nobis in capite, et habueris filias heredes, ipso patre defuncto, antecessores nostri habuerunt et semper nos habuimus et cepimus homagium de omnibus hujusmodi filiabus, et singula earum tenerent de nobis in capite in hoc casu.* And therefore where by the [b] statute *De Prærogativa Regis*, it is provided, *Si una hereditas, &c.* that is but an affirmation of the common law. [c] But this is to be understood where the co-heirs be of full age; for if they be within age and in ward to the king, *Primogenita tantum faciet homagium pro se et sororibus suis, et alie sorores, cum ad ætatem pervenerint, facient servitia domini feodorum per manum primogenitæ.* [d] And therefore if a man hold of a common person by the service of homage, and hath issue divers daughters and dyeth, the eldest daughter onely shall do homage for her and all her sisters. And this appeareth also by the statute of *Hibernia*. *Primogenita tantum faciet homagium domino pro se et omnibus sororibus suis.* And the reason is there rendred afterward, *Quia omnes sorores sunt*

(Ante 10. b.)  
Post. 343. a.

[g] Glanvil. lib. 9. cap. 3. Britton, fol. 170. Tempe E. 1. tit. Juris utrum, 13. (Post. 341. b.) [r] 8 E. 4. 22. 30 E. 3. 15. 3 E. 3. Avowrie 175. [s] 3 E. 3. Avowrie 183. F. N. B. 267. 13 E. 3. gard. 30. [t] 27 Ass. p. 64. F. N. B. 267. 13 H. 6. Avowrie 21. 43 E. 3. 13. 44 E. 3. 41. 3 E. 3. Avowrie 175. 13 E. 3. 2. gard. 30. 28 E. 3. fol. 19. gard. 44. [u] 6 E. 2. gard. 123. 13 E. 3. gard. 30.

[a] 14 H. 3. tit. Prærog. 5.

[b] Prærog. Regis cap. 5. [c] Statut. de homagio capiendo Tempe E. 1. (3) [d] Glanvil. lib. 7. cap. 3. & lib. 9. cap. 3. Bract. lib. 1. de homagio capiendo, & lib. 3. fol. 78. 50. Britton, fol. 168. b. 171. 173. Flota, lib. 3. cap. 16. & lib. 2. ca. 60. & lib. 5. cap. 9. F. N. B. 161. 160. 260. Stanf. prær. 23. 24. (Post. 164. b.)

(1) [See Note 10.]

(2) [See Note 11.]

[c] F. N. B. 168.  
Vid. 11 E. 3.  
Avowrie 101.

[f] 48 E. 3. 23.  
24 E. 3. 73.  
Maurice dcy, cap. 8.  
F. N. B. 168.  
[g] 2 E. 9.  
Avowrie 179.  
C. Ro. Abr. 514.  
F. N. B. 136.)

[h] 7 E. 4. 27.  
26. 14 H. 4. 38.  
1 H. 4. grant 43.  
31 E. 3.  
[i] 116.  
[j] 48 E. 3. 8.  
15 E. 4. 12.  
6 E. 4. 2.

[k] 23 E. 4. 23.

[l] 3 E. 2.  
Avowrie 187.  
13 H. 4. 4.  
13 H. 2. tit.  
Avowrie 89.  
8 H. 3. tit. Pre-  
scription 38.  
Hill. 23 E. 1.  
coram Rege  
E. 4. 43.  
(Post. 73. a.)

*sunt quasi unus heres de una hereditate.* [c] But if the coparceners in that case make partition, then every one shall doe homage, because now it is not *una sed diversa hereditas.* [f] And so it is if one make a feoffment in fee (which is a partition in law for that part) the feoffee shall doe homage, for every tenant in [67. b.] common shall doe severall services. And it hath been adjudged [g] in our bookes, that if the eldest coparcener doe homage to the lord, and afterward the younger sister maketh a feoffment in fee of her part, the lord shall have homage for the part of the younger sister; for that which was *una hereditas*, one inheritance by law, by the alienation, which is her act, is (as hath beene said) divided and become in grosse, and the coparcenary defeated.

But if a tenant infeoffe divers men in fee joyntly, [h] all these jointenants shall joyntly doe their homage, and their fealty also. [i] If homage be due by the tenant, and he maketh a feoffment in fee, the feoffor shall not doe homage; because albeit he is supposed to be tenant in some cases, *quant al avowrie*, yet the feoffee is very tenant, and homage shall ever be done by the very tenant; but that very tenant needeth not to be very tenant of the land, and therefore the mesne because he is very tenant to the lord paramount (though he be not tenant of the land) shall doe homage. And so it is of the disseisee, and of tenant in taile, after a feoffment in fee, for in that case the donee is very tenant to the donor.

If a tenant that holdeth by homage maketh a feoffment in fee of part, [k] that feoffee shall doe homage, and so shall every feoffee of what part soever.

If there be two coparceners or jointenants of a seignory, if the tenant doth homage and fealty to one of them, [l] he shall be excused against the other.

If homage be parcell of a tenure, it is a presumption that the tenure is by knights service, unless the contrary be proved, but of itselfe it maketh not knights service. And yet by custome the heire of him that holds by homage only may be in ward.

More shall be said of homage in the title of Homage Ancestrell (1).

(1) [See Note 12.]

## CHAP. 2.

## Fealty.

## Sect. 91.

**F**EALTY idem est quòd fidelitas en Latin. Et quant franktenant ferra fealtie a son seignior, il tiendra sa maine dexter sur un livre, et dirra issint: Ceo oyes vous, mon seignior, que jeo a vous serra foyal et loyal, et foy a vous portera des tenements que jeo claime a tener de vous, et que loialment a vous ferra les customes et services queux faire a vous doy, as termes assignes, sicome moy aide Dieu et ses Saints; et basera le licore. Mes il ne genulera quant il fait fealty, ne ferra tiel humble reverence come avant est dit en homage.

**F**EALTY is the same that fidelitas is in Latine. And when a freeholder doth fealty to his lord, he shal hold his right hand upon a booke, and shall say thus: Know ye this, my lord, that I shall be faithfull and true unto you, and faith to you shall beare for the lands which I claime to hold of you, and that I shall lawfully doe to you the customes and services which I ought to do, at the termes assigned, so help me God and his Saints; and he shall kisse the book. But he shall not kneele when he maketh his fealty, nor shall make such humble reverence as is aforesaid in homage.

**F**EALTY in French is fealty, and is [a] derived of the Latin word *fides* or *fidelitas*.

[a] Bract. lib. 2. fol. 80.  
Britton, Regist. origin. 302.  
Mirror, cap. 3. de serement & de fealt. Statut. de 17 E. 2. tit. Homage.

“Et quant franktenant.” Every freeholder except tenant in frankalmoigne shall doe fealty. [b] And yet some that are not tenants of any freehold shall do fealty, as a tenant for yeares shall do fealtie (2). Bracton saith, *Denullo tenemento quod tenetur ad terminum, fit homagium, fit tamen inde fidelitatis sacramentum*.

[b] Bracton, lib. 2. fol. 80. a.  
Brit. fol. 173.  
Fleta, lib. 3. ca. 15.  
Littleton, fo. 29. nu. 133.  
4 E. 3. 34.  
9 H. 6. 43.  
10 H. 6. 13.  
5 H. 6. 13. 9 E. 4. 1. 21 E. 4. 20. 5 H. 7. 11

“Que a vous serra foial et loial, &c. et foy a vous portera des tenements que jeo claime a tener de vous, et que loialment a vous ferra les customes et services, &c.”

[c] Fealtie is a part of homage (1), for all the words of [68. a.] fealtie are comprehended within homage (2), and therefore fealtie is incident to homage.

[c] Mirror, cap. 3. de ser. & de fealtie.  
(4 Co. 8. b.)

“Sicome moy aide Dieu.” As homage is the more honourable service, so fealtie is a service more sacred, because he is sworne thereunto. And the reason wherefore the tenant is not sworne in doing his homage to his lord is, for that no subject is sworne to another subject to become his man of life and member but to the king onely, and that is called the oath of allegiance, or *homagium ligeum* (3). And those words for that purpose are omitted out of fealtie, which is to be done upon oath. And Littleton said wel (when a freeholder doth

(7 Co. Calvin's case.)

(2) [See Note 13.]

(2) [See Note 15.]

(3) [See Note 16.]

[68. a.]

(1) [See Note 14.]

[d] Stat. de  
17 E. 2. tit. Ho-  
mage in le Abridge-  
ment.

doth fealtie); [d] for the fealtie of him ti. holdeth in villenage, differeth from the fealtie of the freeholder. For the villeine holding his right hand upon the booke shall say thus to his lord: Hear you, my lord *A.* that I *A. B.* from this day forward shall be to you true and faithful, and shall owe you fealtie for the land that I hold of you in villenage, and shall be justified by you in bodie and goods, so help me God, &c. as by the act (4) appeareth.

## Sect. 92.

**E**T graund diversitie y ad perenter  
feasans de fealtie et de homage;  
car homage ne poit estre fait forsque  
al seignior meme; mes le seneschal de  
court de seignior, ou bailife, puit  
prendre fealtie pur le seignior.

**A**ND there is great diversitie be-  
tweene the doing of fealty and  
of homage; for homage cannot be  
done to any but to the lord himselfe;  
but the steward of the lord's court, or  
bailife, may take fealty for the lord.

Bracton, lib. 2.  
fo. 80.  
21 E. 4. 17. acc.  
2 E. 3. 10.  
32 H. 6. 23.  
9. Co. 76.

**B**RACON, lib. 2. fo. 80. saith thus: *Sciendum est, quod non per procuratores nec per literas fieri poterit homagium; sed in propria personâ, tam domini quam tenentis, capi debet et fieri.*

Vid. for the signifi-  
cation of Seneschal  
and Bailife, Sect.  
78, 79, 248. &c. 379.

"*Mes les seneschal, &c. ou bailife poet prendre fealtie.*" This is  
so evident, as it needeth no explanation.

## Sect. 93.

**I**TEM, tenant a terme de vie fer-  
ra fealtie, et uncore il ne ferra  
homage. Et divers autres diversities  
y sont perenter homage et fealtie.

**A**Lso, tenant for terme of life  
shall doe fealtie, and yet he  
shall not doe homage. And divers  
other diversities there be betweene  
homage and fealty.

9 Co. 76.

**T**HE tenant must doe fealtie in person; because he must be  
sworne into it, and no man can swear by the common law  
by attorney or proctor (5).

## Sect. 94.

**I**TEM, home poit veier 15 E. 3.  
coment home et sa feme fieron  
homage et fealtie en common banke,  
quele este escript devant en tenure de  
homage.

**A**Lso, a man may see in 15 E. 3.  
how a man and his wife shall  
doe homage and fealty in the com-  
mon place, which is written before  
in the tenure of homage.

Plus serra dit de fealtie en le tenure  
en

More shall be said of fealtie in the  
tenure

(4) See the note on this supposed  
statute in 67. b. ante.

(5) [See Note 17.]

*en socage, et en le tenure en frankalmoigne, et en le tenure per homage auncestell.*

tenure in socage, and in frankalmoigne, and in the tenure by homage auncestell.

**T**HIS is evident, and appeareth before; and if lords knew what benefit they may reape by receiving of homage and fealty, they would not neglect them; [e] for by the receiving of either of them it is a sufficient seisin of all manner of services, as by the words [f] of either of them appeareth (6). Now if it be demanded

[e] 4 Co. 8.  
& 9 Co. Bevil's case. 13 E. 4. 6.  
[f] Vid. Sect. 716. 130, 131. 138.

[68. b.] what difference is betweene the oath of fealtie, when it is done to the king in respect of a tenure, and the oath which everie subject ought to take in respect of his allegiance. *Littleton* here setteth downe the oath of fealtie. Now the [g] oath of allegiance is thus, You shall sweare, &c. (1) Then it may be demanded, where and when is this oath to be taken? And it is answered, that whosoever is above the age of twelve yeares, is to be sworne in the tourne, unlesse he be within some leet, and then in the leet (2); and I reade amongst the lawes of Saint Edward (3), *Quodd hanc legem invenit Arthurus, qui quondam fuit inclitissimus rex Britannorum, et ita consolidavit et confederavit regnum Britannia universum semper in unum. Hujus legis autoritate expulit Arthurus predictus Saracenos et inimicos à regno. Lex enim ista diu sospita fuit et ascripta, donec Eadgarus rex Anglorum excitavit, et crexit in lucem, et illam per totum regnum observari precepit.* Which law in some manner is observed at this day (4). But to return to *Littleton* (5).

[g] Brit. ca. 28.  
Calvin's case.  
7 Co. 6. b.  
13 H. 7. 19.  
Lambert 135.

(6) Vid. *that seisin of fealty doth not estop the tenant from traversing the seisin of other services*, 41 E. 3. 25. 50. *John Leilburne's case*. Hal. MSS.—See further as to the advantages accruing from the receiving of homage and fealty, ante 67. b. and post. 92. a. and b. and note 3. in 68. b.

[68. b.]

(1) [See Note 18.]

(2) How the taking of the oaths of

allegiance is regulated by modern statutes, see Com. Dig. tit. *Allegiance*, and Burn's Just. tit. *Oaths*.

(3) As to the laws of Edward the Confessor, the authenticity of those in print is controverted by the famous Dr. Hickes. See Hick. Thesaur. Ling. Septentrion. Dissert. Epist. 95.

(4) [See Note 19.]

(5) [See Note 20.]

## CHAP. 3.

## Escuage.

## Sect. 95. (6)

**ESCUAGE** est apell en Latine Scutagium, c'est ascarvoir, Servitium scuti; et tiel tenant, qui tient sa terre per escuage, tient per service de chivaler. Et auxy il est communement dit, que ascun tient per un fee de service de chivaler, et ascun per le moity d'un fee de service de chivaler, &c. Et il est dit, que quant le roy face voyage royal en Escoce pur subduer les Scotés, donques il, que tient per un fee de service de chivaler, covient estre ove le roy pur 40 jours, bien et covenablement array pur le guerre. Et celuy, que tient sa terre per le moitie d'un fee de chivaler, covient estre ove le roy pur 20 jours; et il que tient son terre per le quart part d'un fee de chivaler, covient estre ove le roy pur 10 jours; et issint que plus, plus, et que miens, miens.

**ESCUAGE** is called in Latine Scutagium, that is, service of the shield; and that tenant, which holdeth his land by escuage, holdeth by knights service. And also it is commonly said, that some hold by the service of one knight's fee, and some by the halfe of a knight's fee. And it is sayd, that when the king makes a voyage royall into Scotland to subdue the Scots, then he, which holdeth by the service of one knight's fee, ought to be with the king fortie dayes, well and conveniently arrayed for the war. And he, which holdeth his land by the moitie of a knight's fee ought to be with the king twentie dayes; and he which holdeth his land by the fourth part of a knight's fee, ought to be with the king ten dayes; and so he that hath more, more, and he that hath lesse, lesse.

[a] Mir. ca. 1. sect. 3.  
Br. fo. 162, &c.  
Ockam cap.  
Quid sit scutagium.  
(F. N. B. 83.  
C. 2. Ro. Abr.  
207. 4 Inst. 192.  
Post. 87. a.  
106. b.)

**"ESCUAGE,"** [a] in Latine Scutagium, (id est) servitium scuti, service of the shield. Hereby it appeareth that right interpretations and etymologies are necessary: for, *ad rectè docendum oportet primum inquirere nomina, quia rerum cognitio à nominibus rerum dependit.*

*Nomina si nescia, perit cognitio rerum.*

(Post. 86. b.)  
177. a.)

And herewith agreeth that which is said, *Primò excutienda est verbi vis, ne sermonis vitio obstructur oratio, sive lex sine argumentis.*

Scutum in French is Escue, and thereof commeth the Escuer, (i.) Scutifer, which we usually call Armiger. [b] Of this Bracton saith, *Item scutagium dicitur, quòd talis præstatio pertinet ad scutum, quod assumitur ad servitium militare.* And Fleta saith, *Sunt quædam servitia forinseca, et dici possunt regalia, quæ ad scutum præstantur, et inde habemus scutagium, et ratione scuti pro feodo militari reputantur:* and Ockham saith, *Hæc itaque summa, quia nomine scutorum solvitur, scutagium nuncupatur* (7).

(Post. 74. b.)

[b] Bract. li. 2. fo. 36. a.  
Flet. l. 3. c. 14.  
Ockam ubi sup.  
27 Ass. 23.  
31 Ass. 38.

[c] *"Et tiel tenant que tient son terre per escuage, tient per service de chivaler."* [d] For as fealty is incident to homage, [69. a.]

80

[c] Mir. ca. 1. sect. 3.  
[d] 2 E. 3. a. b.  
19 E. 3.  
Avowry 304.  
26 H. 3. 1. a.  
30 E. 3.

Per que servit. 11. 43 E. 3. 23. F. N. B. 83, 84. (4 Inst. 192.)

(6) Mr. Madox in his Baron. Angl. 227. animadverts upon this Section of Littleton; as to which see note 2. of 64. a.

ante, and the note at the end of this Chapter of Escuage, post. 74. b.

(7) [See Note 21.]

so homage and knights service be incident to escuage, and by the grant of services escuage passeth with the rest. Every tenure by escuage is a tenure by knights service; but every tenant that holdeth by knights service, holdeth not by escuage, as shall be said hereafter (1). But note here the wisdom of antiquity, [e] *Mavult enim princeps domesticos quam stipendiarios bellicis apponere casibus*, that is, to be served in his warres by his owne subjects, rather then by stipendiary forainers.

(Post. 82. b.)

[e] Lib. rub.

“*Un fee de service de chevalier.*” [f] There is great diversity of opinions concerning the contents of a knight's fee, that is, how much land goeth to the livelyhood of a knight. For some say that a knight's fee consisteth of eight hides, and every hide containeth an hundred acres, and so a knight's fee should containe 800 acres. Others say, that a knight's fee containeth 680 acres. Others say, that an oxgange of land containeth 15 acres, and eight oxgangs make a plowland; by which account a plowland contains 120 acres; and that *virgata terra*, or a yardland, containeth 20 acres. But I hold, that a knight's fee, an hide or plowland, a yardland or oxgange of land, doe not containe any certaine number of acres (2); but a knight's fee is properly to be esteemed according to the qualitie, and not according to the quantity of the land, that is to say, by the value, and not by the content (3). And therefore it is very true, which master Camden in his *Britannia*, page 136, saith, viz. *Subsequenti etate ex censu ut colligitur facti fuerunt equites*, &c. And antiquity thought, that twenty pound land was sufficient to maintaine the degree of a knight, as appeareth in the ancient treatise *de modo tenendi parliamentum* (4) *tempore regis Edw. filii regis Etheldredi*; where it appeareth that *comitatus* (to wit), an earldome, *constat ex viginti feodis unius militis, quolibet feodo computato ad viginti libratas; baronia constat ex 13. feodis, et 3. parte unius feodi militis* (5) *secundum computationem predictam; unum feodum militis constat ex terris ad valentiam 20 l.* Which antiquitie I cite, for that it concurrerh with the act of parliament anno 1 E. 2. *de militibus* (6); by which act *Census militaris* the state of a knight is measured by the value of xx pound *per annum*, and not by any certaine content of acres; and with this agreeth the statute of W. 1. cap. 35. and *F. N. B.* fol. 82. where twenty pound of land in socage is put in equipage of a knight's fee; and this is the most reasonable estimate, for one acre may be better than many others, so as he which hath 680 or 800 acres of some barren land, had not according to the ancient account a sufficient revenue to maintaine the degree of a knight, and he which had a lesse number of acres of some land of the value of xx pound *per annum*, had a sufficient livelihood in those daies for the maintenance of a knight (7). So antiquity thought that 400 markes of land *per annum* was a competent livelihood for a baron, and

[f] 9 Co. 133.  
In Lowe's case.Vide 7. Co. 33.  
34. Nevil's case.  
(34d. 128.)(3. Ra. Abr.  
514, 516.  
F. N. B. 82. c.)

400

(1) See as to this post. 82. b.

(2) [See Note 22.]

(3) Mr. Selden insists, that a knight's fee was estimable neither by the value nor the quantity of the land, but by the services or number of knights reserved. Seld. Tit. Hon. 2d ed. part 2. c. 5. s. 26.

(4) See a note on this treatise post. 69. b.

(5) This notion of there being a certain number of knights fees in an earldom and barony is controverted by Mr. Selden; and he

cites instances of earldoms and baronies with a less as well as with a greater number than lord Coke mentions. Seld. Tit. Hon. 2d ed. part 2. c. 5. s. 26.

(6) Lord Coke in another place observes, that the 1 E. 2. *de militibus*, though called a statute, was only a writ granted by the king in time of parliament, and therefore entered of record. 2. Inst. 593.

(7) [See Note 23.]

400 pound *per annum ad sustinendum nomen et onus* of an earle, and of late time 800 markes *per annum* of a marquisse, and 800 pound *per annum* of a duke; so that their yearly revenue was estimated by the value and not by the content. And one plowland, *carucata terra*, or a hide of land, *hida terra*, (which is all one) is not of any certain content, but as much as a plow can by course of husbandry plough in a yeare. And therewith agreeth *Lambard verbo Hide*. And a plowland may containe a messuage, wood, meadow, and pasture, because that by them the plowmen and the cattell belonging to the plow are maintained. *Vide Tempus E.* 1. tit. Briefe 860. 4 *E.* 3. 47. Pl. Com. in *Hill.* and *Grange's* case, fol. 168. *Vide* 6 *E.* 3. fol. 42. and 39 *H.* 6. 8. a. And the venerable *Bede* calleth a plowland *familiam*, a family; because it containeth necessary things for the maintenance of a family. And *Prisot* well saith in 35 *H.* 6. fol. 29. that a plow may till more land in a yeare in one country than in another; and therefore it stands with reason, that a plowland should be lesse in one place than in another. 41 *E.* 3. tit. Fine 40. and 13 *E.* 3. Fine 67. A fine shall not be received *de una virgata terra* for the uncertainty, *vide* 39 *H.* 6. 8. But an acre of land is certaine by the statute *de terris mensurandis*. Note also (reader) that every plowland of ancient time was of the yearly value of five nobles *per annum*, and this was the living of a plowman or yeoman; and *ex duodecim carucatis constabat unum feodum militis*, which amounts to 20 pound *per annum*. And this you may see *Termino Pasch. anno 3 E.* 1. *coram Rogero de Seyton et sociis suis justitiariis apud Westm. Ebor. Ro.* 10. *Radolphus de Normanville petens in brevi de medio queritur contra Luciam de Kyme, quod [69. b.] cum ipsa teneat de ipso duas earcetas terre in Coningston per homagium et servitium militare, unde duodecim carucate terre faciunt unum feodum militis pro omni servitio, ipsa distrinxit ipsum ad faciendam sectam ad curiam suam de Thorneton in Craven, &c.* (1)

(Post. 76. a. 83. b.)

And it is to be observed, that the reliefe of a knight and all above him which be noble, is the fourth part of their yearly revenue, as of a knight five pound, which is the fourth part of 20 pound. So *una baronia constat ex 13 feodis militum et de 3. parte unius feodo militis*, which amount to 400 markes, and therefore his reliefe is the fourth part of this, viz. 100 markes: and an earledome consists of twenty knights fees, which amount to 400 pound (as before it appeareth by the said ancient record *de modo tenendi parliam ntum, &c.*) (2), and therefore his reliefe is 100 pound. And this also appeareth by the statute of *Magna Charta*, cap. 2. and by the equity of this statute, insomuch as a marquisdome, which consists of the revenue of two baronies, which amount to 800 markes, shall pay according to that just proportion for his reliefe 200 markes; and because a duke-dome consists of the revenues of two earledomes, viz. 800 pound *per annum*, a duke shall pay 200 for a reliefe, which is also the fourth part of his revenue; and with this agree the records of the Exchequer.

Note (reader) at the time of the making of the statute of *Magna Charta*, 9 *H.* 3. there was not any duke, marquisse, or vicount in *England*, and therefore the statute could not make mention of them, and *Edward* the eldest sonne of king *E.* 3. called the Black Prince was the first duke in *England* after the Conquest, and *Robert* earle of *Oxford* in the reign of *R.* 2. was the first marquisse. *Sic enim inter ordines*

(1) [See Note 24.]

(2) [See Note 25.]



*ordines Angliæ in ead Britanniâ testatur Camden ubi supra. Et titulus Marchionis seriùs ad nos devenit, nec ante R. 2. tempora cuiquam delatus; ille enim Robertum Vere Oxoniæ comitem delicias suas primum Marchionem Dubliniæ designavit, merumque erat honoris nomen. Hæc ille.* And before the reigne of H. 6. there was not any viscount. *Sic enim idem author ubi supra asserit. Post comites vicecomites ordine sequuntur. Viscounts nos vocamus. Hæc vetus officii sed nova dignitatis appellatio, et H. 6. tempore ad nos primum audita. Hæc ille. Et dominus de Bello Monte was the first viscount created by king H. 6. Vide Cassianum in gloriâ mundi parte 4. consid. 55. that this dignity of a viscount is of great antiquity in other realmes.*

*Bracton, lib. 2. 36. Item sunt quædam servitia, quæ dicuntur forinseca, quamvis sunt in cartâ de feoffamentis expressa et nominata, et quæ ideo dici possunt forinseca, quia pertinent ad dominum regem, et non ad dominum capitalem, nisi cum in propriâ personâ profectus fuerit in servitio, vel nisi cum pro servitio suo satisfecerit domino regi, &c.*

“*Voyage Royall.*” A voyage royall is not onely, when the king himselfe goeth to warre, as *Littleton* here saith, but also when his lieutenant or deputy of his lieutenant goeth. And what shall be said a voyage royall shall be adjudged in this case by the judges of the common law as an incident to escuage, and not by the constable and marshall, or any other: *et sic de similibus.*

There is also another kind of voyage royall, viz. when one goeth with the king's daughter beyond sea to be married, &c. for such a voyage is for the good of the whole realme (for more profit for the realme cannot be then to make alliance with another nation); but of this voyage royall *Littleton* speaketh not here, but onely of the voyage royall to warre; so as there is a voyage royall of warre, and a voyage royall of peace and amity. And it is to be observed, that he that holdeth by castle gard or cornage holdeth by knights service, and yet he shall pay no escuage, because he holdeth not to goe with the king to warre (3).

“*En Escoce,*” *In Scottiam.* This is put but for an example, for if the tenure be to goe in *Walliam, Hiberniam, Vasconiam Pictaviam, &c.* it is all one. See an ancient record, *Rot. de finibus Termino Mich. 11 E. 2.* Sir *Rich. Rockesley* knight did hold lands at *Seaton* by serjeanty to be *Vantrarius regis*, that is, to be the king's fore-foot-man when the king went into *Gascoigne*, *donec perusus fuit pari solearum pretii 4d.* that is, untill he had worne out a paire of shoes of the price of foure pence. And this service being admitted to be performed when the king went to *Gascoigne* to make warre, is knights service.

“*Il que tient per un fee de service de chivaler, covient esse ove le roy pur 40 jours.*” But this is to be understood of a tenant that holdeth of the king immediately; for every man is bound by his tenure to defend his lord, and both he and his lord the king and his country; and therefore if the lord goeth not, his tenant is excused. But yet if the tenant peravaille goeth with the king, it excuseth all the mesnes.

7 H. 4. 9.  
31 Ass. 39.  
25 Ass. 66.  
27 Ass. 22.  
8 E. 3. 144.  
7 E. 3. 39.  
11 H. 4. 7.  
F. N. B. 29. b.  
& 83. g.  
3 H. 4. 16.  
28 H. 6. 1. b.  
39 H. 6. 38.  
6 R. 2. Protection 46.  
19 R. 2. Gard. 168.  
17 H. 6. Protect. 56.  
7 E. 4. 27.  
11 H. 4. 7.  
3 H. 4. 16.  
(F. N. B. 24. f.  
3 Ro. Ab. 509.)

Lib. Rub. in  
Seacc. 47, 48.  
19 R. 2.  
Gard. 95.  
6 R. 2.  
Protection 46.  
6 H. 3.  
Avowry 243.  
Vid. Rot. Claus.  
8 H. 3. & Fin.  
8 H. 3. &  
Patent. 9 H. 3.  
multisolverunt  
seutagium pro  
exercit. in Wal-  
liam, memb. 30.  
& ante Claus.  
6 H. 3.  
memb. 6.

And

*Magna Charta,*  
cap. 57.  
*Fleta, lib. cap. 60.*

And it is to be observed, that for every pound of the ancient value of a knight's fee accounting twenty pound land, the tenant must goe with the king two dayes, which commeth just to 40 dayes for a whole knight's fee. By the statute of *Magna Charta* it is provided, that *scutagium de cater' capiatur sicut capi consuevit tempore Hen. regis avi nostri.*

## Sect. 96.

[70. a.]

**M**ES il appiert per les ples et arguments faits en un bon plee sur brieve de detinue de un escript obligatorie port per un H. Gray, Tr. 7 E. 3. que ne besoigne a celuy que tient per escuage, de aler oee le roy luy mesme, s'il voile trover un auter person able pur luy convenablement array per le guerre de aler oee le roy. Et ceo semble estre bon reason. Car poit estre, que celuy que tient per tiels services est languishant, issint que il ne poit aler ne chivaucher. Et auxy un abbe ou auter home de religion, ou feme sole, que tient per tiels services, ne doit en tiel cas aler en proper person. Et sir W. Herle, adonque chiefe justice de common bank, disoit en tiel plee, que escuage ne serra graunt mes lou le roy alust luy mesme en son proper person. Et fuist demurre en judgement en mesme le plee, le quels les xl. jours serront accompts de le primer jour del muster de host le roy fait per les commons et per commandement le roy, ou de la jour que le roy primes entra en Escocce. Ideo quere de hoc. (1)

**B**UT it appeareth by the pleas and arguments made in a plea upon a writ of detinue of a writing obligatorie brought by one H. Gray, Tr. 7 E. 3. that it is not needfull for him which holdeth by escuage, to goe himselfe with the king, if he will finde another able person for him conveniently arrayed for the warre to goe with the king. And this seemeth to be good reason. For it may be, that he which holdeth by such services is languishing, so as he can neither go nor ride. And also an abbot or other man of religion, or a feme sole, which hold by such services, ought not in such case to goe in proper person. And sir William Herle, then chiefe justice of the common place, said in this plea, that escuage shall not be granted but where the king goes himselfe in his proper person. And it was demurred in judgment in the same plea, whether the 40 dayes should be accounted from the first day of the muster of the king's host made by the commons and by the commandement of the king, or from the day that the king first entred into Scotland. Therefore enquire of this.

Tr. 7 E. 3.  
fol. 29.  
(V. Co. 130.  
2. Ro. Ab. 500.)

**T**R. 7 E. 3. &c. This is the first booke at large that our author has cited. And it is to be observed, that this point is not debated in the said booke, but onely is there admitted, and yet is good authority in law; for our author saith, that it appeareth by this booke. Now both by *Littleton* himselfe, and by the booke of 7 E. 3. it is apparant, that albeit the tenure is, that he which holdeth by a whole

(1) Mr. Madox observes, that sir William Herle's position, that escuage should not be granted but where the king goes

to the war in person, is fallacious. Mad Baron. Angl. 226.

whole knight's fee ought to be with the king, &c. to do a corporall service, yet he may finde another able man to do it for him.

By the statute of *Magna Charta*, cap. 20. it is provided, that no knight, that holdeth by castle-gard, shall be distreyned to give money for the keeping of the castle: *Si ipse eam facere voluerit in propria persona sua, vel per alium probum hominem faciet, si ipse eam facere non possit propter rationabilem causam.* (4. Co. 88.)

Some have thought, that he that holds by escuage is taken by the equity of this statute, that speaketh onely of castle-gard. But it is holden, that this statute is but an affirmance of the common law. For where that act saith, (*propter rationabilem causam*) that reasonable cause is referred to the tenant's own discretion and choyce, and the cause is not materiall or issuable no more then in the case that *Littleton* here putteth, as hereafter appeareth. And I would advise our student, that when he shall be enabled and armed to set upon the yeare bookes, or reports of law, that he be furnished with all the whole course of the law, that when he heareth a case vouched and applyed either in *Westminster-hall*, (where it is necessary for him to be a diligent hearer, and observer of cases of law) or at readings or other exercises of learning, he may finde out and

[70. b.] read the case so vouched; for that will both fasten it in his memory, and be to him as good as an exposition of that case. But that must not hinder his timely and orderly reading, which (all excuses set apart) he must bind himselfe unto; for there be two things to be avoyded by him, as enemies to learning, *præpostera lectio*, and *præpostera praxis*. But let us now heare what our author will say.

"*Et ceo semble bone reason, &c.*" Here *Littleton* sheweth three reasons wherefore the tenant should not be constrained to doe his service in person.

First, it may be the tenant is sicke, so as he is neither able to goe nor ride. And ever such construction must be made in matters concerning the defence of the realme, or common good, as the same may be effected and performed. To the former disability may be added where a corporation aggregate of many, as deane and chapter, maior and commonalty, &c. or an infant being a purchaser, for these also must finde an able man. But it may be objected, that in these particular cases the tenant might finde a man, but not when he himselfe is able without all excuse or impediment. To this it is answered, that *Sapiens incipit à fine*. And the end of this service is for defence of the realme, and so it be done by an able and sufficient man, the end is effected.

Secondly, seing there are so many just excuses of the tenant, it were dangerous, and tending to the hindrance of the service, if these excuses should be issuable: *Multa in jure communi contra rationem disputandi pro communi utilitate introducta sunt.*

Lastly, both *Littleton*, and the booke in the seventh of *Edward* the third, giveth the tenant power, without any cause to be shewed, to finde an able and sufficient man, and oftentimes *jura publica ex privato promiscuè decidi non debent.*

"*Un abbé, ou autre homme de religion.*" Note, that if the king had given lands to an abbot and his successors to hold by knights service, this had bene good, and the abbot should doe homage and find a man, &c. or pay escuage, but there was no wardship or reliefe or other incident belonging thereunto. And though the law saith, that this

this was a mortmaine, that is, that they held fast their inheritance, yet if the abbot, with the assent of his convent, had conveyed the land to a naturall man and his heires, now wardship and reliefe and other incidents belonged of common right to the tenure. And so it is, if the king give lands to a maior and communalty and their successors, to be holden by knights service, in this case the patentees (as hath beene said) shall doe no homage, neither shall there be any wardship or reliefe, onely they also shall find a man, &c. or pay escuage. But if they convey over the lands to any naturall man and his heires, now homage, ward, marriage, and reliefe, and other incidents belong thereunto. And yet this possibility was *remota potentia*; but the reason hereof is, *Cessante ratione legis cessat ipsa lex*; the reason of the immunity was in respect of the body politique, which by the conveyance over ceaseth, which is worthy of the observation.

And it is to be observed, that every bishop in *England* hath a baronie (2), and that barony is holden of the king in *capite*, and yet the king can neither have wardship or relief.

If two joyntenants be of land holden by knights service, if one goeth with the king, it sufficeth for both, and both of them cannot be compelled to goe, for by their tenure one man is onely to goe.

If the tenant peravaille goeth, it dischargeth the mesne; for one tenure shall pay but one escuage.

6 H. 3.  
Avostry 248.  
F. N. B. 83, 84.

"*Ou auter home de religion.*" Here this word (religion) is taken largely, viz. not onely for regular, or dead persons, as abbots, monkes, or the like, but for secular persons also, as bishops, parsons, vicars, and the like; for neither of them are bound to goe in proper person. For *nemo militans Deo implicetur secularibus negotiis*.

"*Languishant.*" So it may be said of an ideot, a mad man, a leper, a man maymed, blind, deafe, of decrepit age, or the like.

"*Ou fem sole.*" Seeing that a fem sole, that cannot performe knights service, may serve by deputy, it may be demanded, wherefore an heire male being within the age of 21 yeares may not serve also by deputie, being not able to serve himselfe. [71. a.]

To this it is answered, that in cases of minoritie, all is one to both sexes, viz. if the heire male be at the death of the ancestor under the age of one and twenty, or the heire female under the age of 14, they can make no deputy, but the lord shall have wardship as an incident to the tenure: therefore *Littleton* is here to be understood of a feme sole of full age, and seised of land holden by knights service either by purchase or descent.

"*Convencablement arraie fur le guerre.*" So as here are foure things to be observed.

First (as hath been said,) that he may find another.

Secondly, that he that is found must be an able person.

Thirdly, he must be armed at the costs and charge of the tenant; and herein is to be noted, *quod non definitur in iure*, with what manner of armor the souldier shall be arrayed with, for time place and occasion doe alter the manner and kind of the armour (1).

Fourthly, he must have such armor as shall be necessary, and so appointed in readinesse.

*Ferdwit*

[71. a.]

(2) [See Note 27.]

(1) [See Note 28.]

*Ferdwit* is a Saxon word, et significat quietanciam murdri in exercitu. *Worascott* is an old English word, and signifieth liberum esse de oneribus armorum.

It is truly said, quod miles hæc tria curare debet, corpus ut validissimum et perniciosissimum habeat, arma apta ad subita imperia, cætera Deo et imperatori curæ esse.

*Sapiens non semper it uno gradu, sed unâ viâ, non se mutât sed aptat. Qui secundos optat eventus, dimicet arte non casu. In omni conflictu non tam prodest multitudo, quàm virtus.*

*Est optimi ducis scire et vincere, et cedere prudenter tempori. Multum potest in rebus humanis occasio, plurimum in bellicis.*

*Quid tam necessarium est, quàm tenere semper arma, quibus tecus esse possis.* But I will take my leave of these excellent authors of art military, and referre them to those that professe the same, and will returne to *Littleton*.

“*Muster.*” I find this word in the statute of 18 H. 6. cap. 19. and the ancient military order is worthy of observation, for before and long after that statute, when the king was to be served with souldiers for his warre, a knight or esquire of the country that had revenues farmors and tenants, would covenant with the king, by indenture inrolled in the exchequer, to serve the king for such a terme with so many men (specially named in a list) in his warre, &c. an excellent institution that they should serve under him, whom they knew and honoured, and with whom they must live at their returne. These men being mustered before the king’s commissioners, and receiving any part of their wages, and their names so recorded, if they after departed from their captaine within the terme contrary to the forme of that statute, it was felony. But now that statute is of no force; because that ancient and excellent forme of military course is altogether antiquated; but later statutes have provided for that mischiefe.

To muster is to make a shew of souldiers well armed and trained before the king’s commissioners in some open field; *ubi se ostendentes prætudent prælio*. In Latine it is *censere, seu lustrare exercitum*,

By the law before the Conquest musters and shewing of armour should be *uno eodem die per universum regnum, ne aliqui fossint arma familiaribus et notis accommodare, nec ipsi illa mutud accipere, ac justitiam domini regis defraudare, et dominum regem et regnum offendere*.

Concerning the point in law, demurred in judgement, in the seventh of Edward the third, here mentioned by our author, the law accounteth the beginning of the fortie dayes after the king entreth into the foreine nation; for then the war beginneth, and till he come there, he and his host are said to goe towards the warre, and no military service is to be done till the king and his host come thither.

“*Sir William Herle.*” A famous lawyer, constituted chiefe justice of the common pleas by letters patents dated 2 die Martii anno 5 E. 3. It appeareth by *Littleton*, and by the records, that he was a knight, against the conceit of those, that thinke, that the chiefe justices of the court of common pleas were not knighted till long after.

Our student shall observe, that the knowledge of the law is like a deepe well, out of which each man draweth according to the strength of his understanding. He that reacheth deepest, he seeth the amiable and admirable secrets of the law, wherein, I assure you, the

Fleta, lib. 1.  
cap. 42.

Livius.

Vegetius.

Polibius.

Vegetius.

(3. Inst. 86.  
Cro. Cha. 71.)  
6. Co. 27. the  
souldiers case.

(Lamb. 20. 135. 6.)

the sages of the law in former times (whereof sir *William Herle* was a principall one) have had the deepest reach. And as the bucket in the depth is easily drawne to the uppermost part of the water, (for *nullum elementum in suo proprio loco est grave*) but take it from the water, it cannot be drawne up but with a great difficultie; so albeit beginnings of this study seem difficult, yet when the professor of the law can dive into the depth, it is delightfull, easie, and without any heavy burthen, so long as he keepe himselfe in his owne proper element.

*Glanville, lib. 2.  
cap. 6, &c.*

"Justice." In *Glanvil* he is called *justitia in ipso abstracto*, [71.b.] as it were justice itselfe; which appellation remains still in *English* and *French*, to put them in mind of their duty and functions. But now in legall *Latin* they are called *justiciarii tanquam justi in concreto*, and they are called *justiciarii de banco*, &c. and never *judices de banco*, &c.

"Comon banke." Banke is a *Saxon* word, and signifieth a bench or high seat, or a tribunall, and is properly applyed to the justices of the court of common pleas, because the justices of that court set there as in a certaine place: for all writs returnable into that court are *coram justiciariis nostris apud Westmon.* or any other certaine place where the court set; and legall records tearme them *justiciarii de banco*. But writs returnable into the court called the king's bench are *coram nobis (i. e. rege) ubicunque fuerimus in Angliâ*; and all judiciall records there are stiled *coram rege*. But for distinction sake it is called the king's bench; both because the records of that court are stiled (as hath beene sayd) *coram rege*, and because kings in former times have often personally sate there (1). For the antiquity of the court of common pleas, they erre, that hold that before the statute of *Magna Charta* there was no court of common pleas but had its creation by or after that charter; for the learned know, that in the sixe and twentieth yeare of *Edward* the third, the abbot of *B.* in a writ of assise brought before the justices in eire claimed consuance and to have writs of assize and other originall writs out of the king's court by prescription, time out of mind of man, in the raignes of Saint *Edmond*, and Saint *Edward* the Confessor before the Conquest. And on the behalfe of the abbot were shewed divers allowances thereof in former times in the king's courts, and that king *Henry* the first confirmed their usages, and that they should have consuance of pleas, so that the justices of the one bench or the other should not intermeddle. And the statute of *Magna Charta* erecteth no court, but giveth direction for the proper jurisdiction thereof in these words: *Communia placita non sequantur curiam nostram, sed teneantur, in aliquo certo loco*. And properly the statute saith, *non sequantur*, for that the king's bench did in those dayes follow the king *ubicunque fuerit in Angliâ*, and therefore enacteth that common pleas should be holden in a court resident in a certaine place. In the next chapter of *Magna Charta* (made at one and the same time) it is provided; *et ea, que per eodem (s. justiciarios itinerantes) propter difficultatem aliquorum articulorum terminari non possunt, referantur ad justiciarios nostros de banco, et ibi terminentur*. And in the next to that, *Assise de ultimâ præsentatione semper capiantur coram justiciariis de banco, et ibi terminentur*. Therefore it manifestly appeareth, that at the making

*2d. Am. p. 24.  
4 E. 3. fol. 19.  
Bracton, lib. 3.  
fol. 103. b.  
Britton, fol. 1. & 2.  
Flet. lib. 2. cap. 2.  
Mirror, cap. 5.  
sect. 1.  
Fortescue, cap. 51.  
See in the preface  
to the third part of  
my Reports.*

*Mirror, cap. 5.  
sect. 2.  
Fleta, lib. 2.  
cap. 54.*

making of the statute of *Magna Charta* there were *justiciarii de banco*, which all men confesse to be the court of common pleas. And therefore that court was not erected by or after that statute (2). For the authority of this court, it is evident by that which hath beene said, that it hath jurisdiction of all common pleas. But let us returne to *Littleton*.

“*Demurre en judgement.*” A demurrer commeth of the *Latine* word *demorari* to abide; and therefore he which demurreth in law, is said, he that abideth in law: *Moratur* or *demoratur in lege*. Whosoever the counsell learned of the party is of opinion, that the count or plea of the adverse party is insufficient in law, then he demurreth or abideth in law, and referreth the same to the judgement of the court; and therefore well saith *Littleton* here, *demurre en judgement*; the words of a demurrer being, *quia narratio, &c. materiaque in eodem contenta minus sufficiens in lege existit, &c.* and so of a plea, *quia placitum, &c. materiaque in eodem contenta minus sufficiens in lege existit, &c. unde pro defectu sufficientis narrationis sive placiti, &c. petit judicium, &c.* But if the plea be sufficient in law, and the matter of fact be false, then the adverse partie taketh issue thereupon, and that is tried by a jury; for matters in law are decided by the judges, and matters in fact by juries, as elsewhere is said more at large.

Now as there is no issue upon the fact, but when it is joyned betwene the parties, so there is no demurrer in law, but when it is joined; and therefore when a demurrer is offered by the one party, as is aforesaid, the adverse party joyneth with him, (for example) saith, *quod placitum prædictum, &c. materiaque in eodem contenta bonum et sufficiens in lege existunt, &c. et petit judicium*, and thereupon the demurrer is said to be joyned, and then the case is argued by counsell learned of both sides; and if the poynts be difficult, then it is argued openly by the judges of that court, and if they or the greater part concur in opinion, accordingly judgement is given; and if the court be equally divided, or conceive great doubt of the case, then may they adjourne it into the exchequer chamber, where the case shall be argued by all the judges of *England*; where if the judges shall be equally divided, then (if none of them change their opinion) it shall be decided at the next parliament by a prelate, two earles, and two barons, which shall have power and commission of the king in that behalfe, and by advice of themselves, the chancellor, treasurer, the justices of the one bench and the other, and other

[72. a.] of the king's counsell and as many such as shall seeme convenient, shall make a good judgement, &c. And if the difficulty be so great as they cannot determine it, then it shal be determined by the lords in the upper house of parliament (1). See the statute, for it extends not onely to the case abovesaid, but also where judgements are delayed in the chancery, king's bench, common bench, and the exchequer, the justices assigned, and other justices of oyer and terminer, sometime by difficulty, sometime by divers opinions of justices, and sometime for other causes. [a] Before which statute, if judgements

(2) [See Note 30.]

[72. a.]

(1) See further, as to the adjourning of causes into the exchequer chamber in order

to have the opinion of all the judges, 4. Inst. 110. 118. and *Warraine and Smith*, 2. Bulstr. 146. in which case the court refused to grant a motion for such an adjournment.

(Doct. Pl. 118.  
s. Co. 114.)

(s. Co. 69.  
Hob. 164.)

Vid. Bract. lib.  
5. §. 322. b.

14 E. 3. cap. 6.  
Statut. 1.

Rot. Parlia.  
14 E. 3. nu. 31.  
a proceeding in  
sir John Stanton's  
case upon  
difficulty in the  
court of common  
pleas.  
Vide Britton,  
fol. 41.  
21 E. 3. 37, 38.  
39 E. 3.  
fo. 1. 21. 35.  
40 E. 3. 34.  
13 H. 4. 3, 4.  
[a] 4 E. 3. ca. 14.

judgements were not given by reason of difficulty, the doubt was decided at the next parliament, (which then was to be holden once every yeare at the least) (2). [b] *Si autem talia nunquam prius evenerint, et obscurum et difficile sit eorum judicium, tunc ponatur judicium in respectum usque ad magnam curiam, ut ibi per concilium curie terminentur.* But hereof thus much shall suffice. [c] He that demurreth in law confesseth all such matters of fact as are well and sufficiently pleaded. If there be a demurrer for part and an issue for part, the more orderly course is to give judgement upon the demurrer first; but yet it is in the discretion of the court to try the issue first, if they will. After demurrer joyned in any court of record, the judges shall give judgment according as the very right of the cause and matter in law shall appeare, without regarding any want of forme in any writ, returne, plaint, declaration, or other pleading, proces, or course of proceeding, except those onely which the party demurring shall specially and particularly set downe and expresse in his demurrer (3). [a] Now what is substance and what is forme you shall read in my Reports.

[b] Bracton, lib. 1. cap. 2. nu. 7.  
Brit. fol. 41.  
1 E. 3. 7. 8.  
2 E. 3. 6. 7.  
[c] 17 E. 3. 50. b.  
47 E. 3. 13, 14.  
5 H. 7. 1.  
13 E. 4. 7. b.  
Pl. Com. 85.  
411. 172.  
(a. Co. 60. b.  
1. Sid. 10.  
Post. 135.  
Hob. 232. 233.  
Doe. Pla. 115, 116.)  
48 E. 3. 18.  
2 R. 2. inquest. 2.  
38 E. 3. 25.  
11 H. 4. 5. 78.  
3 E. 4. 2.  
[a] 3. Co. 57.  
Lane. Col. case.  
5. Co. 74.  
Wymek's case.  
10. Co. 82. page 98. Doctor Leyfield's case. (1. Leon. 178. Doe. Pla. 116, 117.)

And in some cases a man shall alledge speciall matter, and conclude with a demurrer; [b] as in an action of trespass brought by *I. S.* for the taking of his horse, the defendant pleads that he himselfe was possessed of the horse untill he was by one *I. S.* dispossessed, who gave him to the plaintife, &c. the plaintife saith that *I. S.* named in the barre and *I. S.* the plaintife were all one person, and not divers; and to the plea pleaded by the defendant in the manner, he demurred in law, and the court did hold the plea and demurrer good, for without the matter alledged he could not demurre. Now as there may be a demurrer upon counts and pleas, so there may be of aid prier, voucher, receipt, waging of law, and the like. [c] By that which hath been said it appeareth, that there is a generall demurrer, that is, shewing no cause, and a speciall demurrer, which sheweth the cause of his demurrer. Also by that which hath been said, there is a demurrer upon pleading, &c. and there is also a demurrer upon evidence. [d] As if the plaintife in evidence shew any matter of record, or deeds or writings, or any sentence in the ecclesiasticall court, or other matter of evidence by testimony of witnesses, or otherwise, whereupon doubt in law ariseth, and the defendant offer to demurre in law thereupon, the plaintife cannot refuse to joine in demurrer, no more then in a demurrer upon a count, replication, &c. and so *è converso* may the plaintife demurre in law upon the evidence of the defendant.

But if [e] evidence for the king in an information or any other suit be given, and the defendant offer to demurre in law upon the evidence, the king's counsell shall not be enforced to joine in demurrer; but in that case, the court may direct the jury to finde the speciall matter.

"*En judgement.*" For the signification of this word, *Vide* Sect. 366.

(2) See 4. Inst. 9. and Com. Dig. *Parliament*, C.

(3) Sec. 27 Eliz. c. 5. and 4 Ann. c. 10.



## Sect. 97.

**E**T apres tiel voyage royal en Escoce, il est communement dit, que per autoritie de parliament l'escuage serra assesse et mis en certaine; scilicet, certaine somme d'argent, quant chescun, que tient per entier fee de service de chivaler, quel ne fuit per luy mesme, ne per un auter pur luy, ove le roy, paiera a son seignior de que il tient la terre per escuage. Sicome mitomus, que il fuit ordaine per autoritie de la parliament, que chescun, que tient per entier fee de service de chivaler, que ne fuit ove le roy, payera a son seignior xl s. donque celui que tient per moitie d'un fee chivaler, ne payera a son seignior forsque xx s. et celui que tient per la quart part de fee de chivaler, ne payera forsque x s. et sic que pluis, pluis, et que meins, meins.

**A**ND after such a voyage royall into Scotland, it is commonly said, that by authority of parliament the escuage shall be assessed and put in certaine; scil. a certaine summe of money, how much every one, which holdeth by a whole knight's fee, who was neither by himselfe, nor by any other, with the king, shall pay to his lord of whom he holds his land by escuage. As put the case, that it was ordained by the authoritie of the parliament, that every one, which holdeth by a whole knight's fee, who was not with the king, shall pay to his lord fortie shillings; then he which holdeth by the moitie of a knight's fee, shall pay to his lord but twentie shillings; and he which holdeth by the fourth part of a knight's fee, shall pay but x s. and he which hath more, more, and which lesse, lesse (5).

**A**PRES voiage royall, &c. il est communement dit, que per authority de parliament escuage serra assesse." Nota, here is a secret of law included, that albeit escuage incertaine be due by tenure, yet because the assessment thereof concerned so many and so great a number of the subjects of the realme, it could not be assessed by the king or any other but by parliament: [a] and this [72. b.] was by the common law (1.)

[a] 13 H. 4. 5.

[b] No escuage was assessed by parliament since the reign of Edward the second, and in the eight yeare of his reign escuage was assessed (2).

[b] 8 H. 3.  
Rot. Claus. &  
Rot. finium,  
memb. 30. & ante.

If the tenant goeth with the king, and dyeth in exercitu, in the host or armie, he is excused by law, and no escuage shall be demanded.

Staff. P. 14 E. 1.  
de banco.

And it is to be observed, that if he that holds of the king by escuage, goeth, or findeth another to goe for him with the king, &c. then he shall have escuage of his tenants that hold of him by such service (3), which must be assessed by parliament.

F. N. B. 84.  
Bract. lib. 2. 3c. 7.

But if the king's tenant goeth, not with the king, then he shall pay for his default escuage; and shall have no escuage of his tenants (4). Richard the second making a voyage royall into Scotland, at the petition of his commons pardoned the payment of escuage. (5)

F. N. B. 84.  
Rot. Parl.  
9 R. 2. pu. 40.

- (1) [See Note 51.]  
(2) See ante 69. b. note 3.  
(3) [See Note 32.]

- (4) [See Note 33.]  
(5) [See Note 34.]

## Sect. 98.

**E**T ascuns teignent per la custome (6), que si l'escuage courge per autoritie de parliament a ascun summe de money, que ils ne paieront forsque la moitie de ceo, et ascuns teignent que ils ne payeront forsque le quart part de ceo. Mes per ceo que l'escuage que ils paieront est non certain, pur ceo que n'est certaine coment le purliament asscessera l'escuage aux teignent per service de chivaler. Mes auterment est de l'escuage certaine, de que serra parle en le tenure do socage.

Wile Sect. 120.

15 E. 2. tit.

Avow. 915.

29. Ass. 165.

30 E. 3. 23. b.

4. Co. 86. in Luttrell's case.

**A**SCUNS teignent per custome, &c." Nota, that escuage is directed by custome.

"Mes auterment est de escuage certaine." Here it appeareth, that escuage is two-fold, viz. escuage incertaine, whereof *Littleton* here speaks; and escuage certain. *Quemadmodum incertitudo scutagii facit servitium militare, ita certitudo scutagii facit socagium.* But more of this in the Chapter of Socage, [73. a.] Sect. 120.

"Per parliament." Of the antiquitie and autoritie of this court, see Sect. 164.

## Sect. 99.

**E**T si home parle generalment d'escuage, il serra entēdue per le common parlance d'escuage non certaine, que est service de chivaler. Et tiel escuage trait a luy homage, et homage trait a luy fealtie; car fealtie est incident a chescun manner de service, forsque a la tenure en frankalmoigne, comme serra dit apres en le tenure de frankalmoigne. Et issint il que tient per escuage, tient per homagē, fealtie, et escuage.

**A**ND if one speake generally of escuage, it shal beintended by the common speech of escuage incertaine, which is knights service. And such escuage draweth to it homage, and homage draweth to it fealtie; for fealtie is incident to every manner of service, unlesse it be to the tenure in frankalmoigne, as shal be said afterward in the tenure of frankalmoigne (1). And so he, which holdeth by escuage, holds by homage, fealty, and escuage (2).

"ET

(6) The words in L. and M. and Roh. *per ascun tenantes teignent*, and the words *per la custome* are omitted.

[73. a.]

(1) See acc. Mad. Baron. Angl. 166.

(2) [See Note 35]

**E**T si home parle generalment d'escuage, il serra intend per le common parlance d'escuage non certain."

(2. Idet. 484.)  
6. Co. 20.  
Post. 78. b.  
189. a. 381. b.  
1. Sid. 266.  
11. Co. 39. a.)  
Easements ex  
Ley. Sect. 100.  
110. 367. 377. 393.  
406. 463. 463.  
8 E. 2. Recedit  
8 E. 2. 163.

*Verba equivocata et in dubio posita intelliguntur in digniori et potentiori sensu.* Tenure in capite ex vi termini is a tenure in grosse, and it may be holden of a subject; but being spoken generally, it is *secundum excellentiam* intended of the king, for he is *caput reipublice*.

165. 20 H. 6. 23. 21 H. 6. 8. 37 H. 6. 29. 13 H. 4. 4. 6 El. Dyer 236. 10 E. 4. 11. 32 E. 3. Gard. 31. Brit. fol. 163.

"*Et tiel escuage trait a luy homage, et homage trait a luy feal- tie; car fealtie est incident a chescun manner de service, forsque a tenure en frankalmoigne.*" This is gathered by the effects of their tenure, for essences are found out by properties, fountains by rivers, and causes by effects: for amongst others, the lords shall have escuage of their tenants, &c. as it followeth.

40 E. 3. 21.  
8 H. 7. 4.

## Sect. 100.

**E**T est ascavoire, que quant escuage est tielment assesse per autoritie de parliament, chescun seignior, de que le terre est tenus per escuage, avera l'escuage issint assesse per parliament; pur ceo que il est intendus per la ley, que al [73. b.] commencement tiels tenements fueront dones per les seigniors a les tenants de tener per tielx seroices, a defender lour seigniors auxy bien come le roy, et mitter en quiet lour seigniors et le roy de les Scotas avantdits.

**A**ND it is to be understood, that when escuage is so assessed by authoritie of parliament, everie lord, of whom the land is holden by escuage, shal have the escuage so assessed by parliament; because it is intended by the law, that at the beginning such tenements were given by the lords to the tenants to hold by such services, to defend their lords as well as the king, and to put in quiet their lords and the king from the Scots aforesaid.

## Sect. 101.

**E**T pur ceo que tiels tenements deviendront primes des seigniors, il est reason que ils averont l'escuage de lour tenants. Et les seigniors en tiel case purront distreiner pur l'escuage issint assesse, ou ils en ascuns cases purront aver briefe le roy direct as viconts de meme les counties, &c. de levier tiel escuage pur eux, sicome ap- piert per le Register. Mes de tiels tenants, queux teignent per escuage de roy, queux ne fueront ove le roy en Escoce, le roy mesme avera l'escuage.

**A**ND because such tenements came first from the lords, it is reason that they should have the escuage of their tenants. And the lords in such case may distreine for the escuage so assessed, or they in some cases may have the king's writs directed to the sheriffs of the same counties, &c. to levie such escuage for them, as it appeareth by the Register. But of such tenants, as hold of the king by escuage, which were not with the king in Scotland, the king himselfe shall have the escuage.

“ LES

F. N. B. 84.  
Regist. 88. de  
Seutagio habendo.

"**L**ES seignours averont l'escuage, &c." This is evident.

"*Briefe le roy.*" This commeth of the *Latine* word *Breve*.  
*Fitzh.* in his preface to his *N. B.* saith of them, that they be those foundations, whereupon the whole law doth depend.

[a] Bracton, lib. 2.  
fol. 413.  
Pleta, lib. 2.  
cap. 12.  
Britton, fol.  
122. 237.  
(1. Sid. 187.)  
(7. Co. 4. a.  
4. Inst. 10.)

[a] Bracton describeth a writ thus: *Breve quidem, cum sit formatum ad similitudinem regule juris; quia breviter et paucis verbis intentionem proferentis exponit, et explanat, sicut regula juris rem, que est, breviter enarrat. Non tamen ita breve esse debeat quin rationem et vin intentionis contineat.*

Of writs some be original, *brevia originalia*, and some be judicial, *brevia judicialia*.

Also of originals, *quedam sunt formata sub sua casibus et de cursu, et de communi consilio totius regni concessa et approbata, que quidem nullatenus mutari poterint absque consensu et voluntate eorum; et quedam sunt magistralia, et sepe variantur secundum varietatem casuum, factorum et querelarum*; as for example, actions upon the case, which varie according to the varietie of everie man's case, and the like; and these being not of course, the masters being learned men did make: *Item brevium originalium alia sunt realia, alia personalia, alia mixta: Item brevium originalium, alia sunt patentia sive aperta, et alia clausa.* Certaine it is, that the original writs are so artificially and briefly compiled, as there is nothing redundant or wanting in them, of which an honourable secretary of state once said, that it was not possible to comprehend so much matter so perspicuously in fewer words. Of all these kinds of writs you shal read plentifully in the *Register*, whereof *Littleton* maketh mention in this place, and also in *Fitzh. N. B.*

(Plowd. 238. a.  
4. Inst. 79.)  
Bracton, ubi  
supra.  
Britton, ubi supra.  
Regist. 88.  
F. N. B. 84.

"*Sicome appiert per le Register.*" *Register* is the name of a most ancient booke, and of great authoritie in law, containing all the originall writs of the common law; of which booke see more in the preface to the ninth part of my Reports, and containeth also *brevia judicialia, que sepius variantur secundum varietatem placitorum proponentis et respondentis* (1).

Also it appeareth by the *Register*, that the king shall have escuage of his tenants, which hold of him as of a mannor which he hath in ward (2), or by reason of a vacation of a bishopricke.

And so shall a common person, if he hath an estate for life or for yeares of a seigniorie.

F. N. B. 84.

## Sect. 102.

[74. a.]

**I**TEM, en tiel case avantdit, lou le roy face un voyage royall en Escocce (1), et l'escuage est assesse perparliament, si le seignior distreine son tenant, que tient de luy per service d'entier fee de chivaler, pur

**I**TEM, in such case aforesaid, where the king maketh a voyage royall into Scotland, and the escuage is assessed by parliament, if the lord distraine his tenant, that holdeth of him by service of a whole knight's fee,

(1) See further as to the Register of Writs, Nichols. Engl. Histor. Libr. 2d ed. 205.

(2) See ante 72. b. note 3.

[74. a.]

(1) [See Note 36.]

pur l'escuage issint assesse, &c. et le tenant plede, et voit averrer, que il fuit ove le roy en Escoce, &c. per xl. jours, et le seignior voit averrer le contraire, il est dit, que il serra trie per le certificat del marshall del host le roy (2) en escript south son seale (3) que serra mis a les justices.

fee, for the escuage so assessed, &c. and the tenant pleadeth, and will aver, that he was with the king in Scotland, &c. by 40 dayes, and the lord will averre the contrary, it is sayd, that it shall be tryed by the certificat of the marshall of the king's host in writing under his seale, which shall be sent to the justices.

**"ET** voit averrer, que il fuit ove le roy en Escoce per 40 jours, &c. [a] il est dit, que il serra trie per le certificat del marshall." This is a tryall appointed by the law, *ne curia regis deficeret in justitiâ exhibendâ*. [b] Herewith agreeth the Register, where the marshall is called *constabularius exercitus nostri*.

(6 Co. 31.)  
[a] 2 E. 4. 11.  
4 E. 4. 10.  
21 E. 4. 10.  
F. N. B. 86.  
11 H. 7. 8.  
9 Co. 32. Case de  
Strat. Mare.  
[b] Regist. 88.  
F. N. B. 84. 2 E. 4. 1. 4 E. 4. 10. 9 H. 4. 3. 11 H. 7. 2. 21 E. 6. 50. 23 E. 6. 1. 45.

"*Marshall del hoste le roy*," *Mareschallus exercitus*, in Saxon *Marischalk*, i. e. *equitum magister*. This word *Marshall* is either derived of *Mare*, or of *mare* an horse, and *schalc*, which signifieth in the Saxon tongue, a master or governor. [c] In the lawes before the Conquest it is said, *Mareschalli exercitus seu ductores exercitus Heretoches per Anglos vocabantur. Illi ordinabant acies densissimas in praeliis et alas constituiebant, prout decuit, et prout ei melius visum fuerit ad honorem coronæ et ad utilitatem regni*. [d] And here it is to be observed, that his certificate in this case is a triall in law. I read of sixe kinds of certificates allowed for trialls by the common law; the first whereof *Littleton* here speaketh of, in time of warre out of the realme. 2. In time of peace out of the realme. [e] As if it be alledged in avoydance of an outlawrie, that the defendant was in prison at *Burdeaux* in the service of the maior of *Burdeaux*, it shall be tryed by the certificate of the maior of *Burdeaux*. 3. For matters within the realme, [f] the custome of *London* shall be certified by the maior and aldermen by the mouth of the recorder. 4. By certificate of the sherife upon a writ to him directed [g] in case of privilege, if one be a citizen or a forreiner. 5. Triall of records by certificate of the judges in whose custody they are by law. All these be in temporall causes. 6. In causes ecclesiasticall, as loyalty of marriage, generall bastardie, excommungement, profession; these and the like are regularly to be tried by the certificate of the ordinarie (4).

And there be divers other trialls allowed by the common law, than by a jury of 12 men, which you may reade at large in the ninth booke of my Reports, fol. 30, 31, &c. in the case of the abbot of *Strata Marcella*, which are as plainly set downe there, as they can be here. And in this case, if the triall should not be by certificate, it should want triall, which should be inconvenient. Only in this place I will adde something of a foreine triall which I finde not in any

[c] Lamb. fol. 186.

[d] 2 E. 4. 1. b.  
4 E. 4. 10.  
23 E. 4. 47.  
F. N. B. 86.  
[e] Inst. 422.  
Post. 261. a.)  
[e] 4 E. 4. 10.

[f] 5 E. 4. 30.  
21 E. 4. 16.  
[g] Ro. Ab. 679.)  
[g] 10 E. 6. 10.  
(Forrest. cap. 32.)  
(12 Co. 67.)

(4 Inst. 134.)

(2) In L. and M. the words are *constable de la hoste le roy*.

(3) In L. and M. there is an &c. after *seale*, and the words *que sera mis a les*

*justices* are omitted.

(4) See further as to trial by certificate, Com. Dig. tit. *Certificate*, and title *Trial* in Viner and the other Abridgments.

any of the treatises lately published against single combats ; because it may deterre men from that ungodly and unlawful kinde of revenge, whereupon many murders have ensued, and prevent all hope of impunity for default of triall in that case.

Stat. de 1 H. 4.  
Cap. 14.  
13 H. 4. fol. 5.  
Vit. Rot. Par-  
lam. 8 H. 6.  
no. 38.  
Scot. Pl. Cor.  
20. 65.

If a subject of the king be killed by another of his subjects out of *England* in any forreine country, the wife or he that is heire of the dead may have an appeale for this murder or homicide before the constable and the marshall, whose sentence is upon testimony of witnesses or combate. And accordingly, where a subject of the king was slaine in *Scotland* by others of the king's subjects, the wife of the dead had her appeale therefore before the con-[74. b.] stable and the marshall. And so it was [\*] resolved in the raigne of queen *Elizabeth* in the case of sir *Francis Drake*, who strook off the head of *Dowtie in partibus, transmarinis*, that his brother and heire might have an appeale. *Sed regina noluit constituere constabularium Anglie, &c. et ideo dormivit appellum.*

[\*] Anne  
25 Eliz.  
(Post. 261. Hut. 3.)

If a man be mortally wounded in *France*, and dieth thereof in *England*, it is said that an appeale doth lie upon the said statute; for it is not punishable by the common law, and the proceeding there (as hath beene said) is upon witnesses or combate, and not by jurie, and the mortal wound was given out of the realme (1).

(1) [See Note 37.]

## CHAP. 4.

## Of Knights Service.

## Sect. 103.

**T**ENURE per homage fealty et escuage est a tener per service de chivaler, et trait a luy gard mariage et relief. Car quant tiel tenant morrust, et son heire male est deins l'age de 21 ans ; le seignior avera la terre tenus de luy tanque al age del heire de 21 ans ; le quel est appel pleine age, pur ceo que tiel home, per entendement del ley, n'est pas able de faire tiel service de chivaler devant l'age de 21 ans. Et auxy si tiel heire ne soit marie al temps de mort de tiel auncester, donque le seignior avera le garde et le mariage de luy. Mes si tiel tenant devie, son heire female estant d'age de 14 ans ou de plus, donque le seignior n'avera my le garde del terre, ne de corps ; pur ceo que feme de tiel age poit aver baron able de faire service de chivaler. Mes si tiel heire female soit deins l'age de 14 ans, et nient marie al temps de la mort son auncester, donque le seignior avera le garde de la terre tenus de luy tanque al age de tiel heire female de 16 ans ; pur ceo que il est done per le statute de Westm. 1. cap. 22. que per 2 ans procheine ensuant les dits 14 ans, le seignior poit tender convenable mariage sans disparagement a tiel heire female. Et si le seignior deins les dits 2 ans ne luy tender tiel mariage, &c. donque el al fine des dits 2 ans poit enter et ouste son seignior. Mes si tiel heire female soy marie deins l'age de 14 ans en la vie son uncester, et son auncester devy, el estant deins l'age de 14 ans, le seignior n'avera forsque la garde de la terre jusques a fine de 14 ans d'age de tiel heire female et donque son baron et luy poient enter en la terre, et ouste le seignior. Car ceo est hors de cas de le dit estatute, entant que le seignior ne poit tender mariage a luy que est marie, &c. Car devant le dit estatute Westm. 1. tiel issue female, que fuit deins age de 14 ans al temps de mort son auncester,

ct

**T**ENURE by homage fealty and escuage is to hold by knights service, and it draweth to it ward mariage and reliefe. For when such tenant dyeth, and his heire male be within the age of 21 yeares, the lord shall have the land holden of him untill the age of the heire of 21 yeares; the which is called full age, because such heire, by intendment of the law, is not able to doe such knights service before his age of 21 yeares. And also if such heire be not married at the time of the death of his ancestor, then the lord shall have the wardship and marriage of him. But if such tenant dieth, his heire female being of the age of 14 yeares or more, then the lord shall not have the wardship of the land, nor of the bodie ; because that a woman of such age may have a husband able to doe knights service. But if such heire female be within the age of 14 yeares and unmarried at the time of the death of her ancestor, the lord shal have the wardship of the land holden of him untill the age of such heire female of 16 yeares ; for it is given by the statute of W. 1. cap. 22. that by the space of two yeares next ensuing the sayd 14 yeares, the lord may tender convenable mariage without disparagement to such heir female. And if the lord within the said two years do not tender such mariage, &c. then she at the end of the said 2 yeares may enter, and put out her lord. But if such heire female be married within the age of 14 yeres in the life of her ancestor, and her ancestor dieth, she being within the age of 14 yeares, the lord shall have only the wardship of the land untill the end of the 14 yeares of age of such heire female, and then her husband and she may enter into the land, and oust the lord. For this is out of the case

case

et puis que el avoit accomplish l'age de 14 ans, sans aucun tender de mariage per le seignior a luy, tiel heire female donque puissoit enter en le terre et ouste le seignior, sicome appiert per le rehearsull et parolx de le dit statute; issint que le dit statute fuil fait en tiel cas tout pur l'avantage de seigniors, come il semble. Mes uncore ceo tous foits est entendue per les parolx de meme le statute, que le seignior n'avera le deux ans apres les 14 ans, come est avantdit, mes loutiel heire female soit deins l'age de 14 ans, nient marie al temps de mort son ancestor.

case of the said statute, insomuch as the lord cannot tender marriage to her which is married, &c. For before the said statute of W. 1. such issue female, which was within the age of 14 yeares at the time of the death of her ancestor, and after she had accomplished the age of 14 yeares, without any tender of marriage by the lord unto her, such heire female might have entred into the land and ousted the lord, as appeareth by the rehearsall and words of the said statute; so as the said statute was made (as it seemeth) in such case altogether for the advantage of lords. But yet this is alwayes intended by the words of the same statute, that the lord shall not have these two yeares after the 14 yeares, as is aforesaid, but where such heire female is within the age of 14 yeares, and unmarried at the time of the death of her ancestor (1).

(G Co. 75. b.)  
[a] Glanvil.  
lib. 7. cap. 10.  
[b] Regist. 2.  
30 E. 3. 24.  
[c] Glanvil.  
lib. 7. cap. 14.  
[d] Glanvil.  
lib. 7. cap. 9.  
&c. Fleta,  
lib. 1. cap. 8.  
Bracton, lib. 2.  
fo. 85.  
Britton, fol. 102.  
&c. fol. 28. & 94.  
Oekham in diversis  
locis.  
Mirror, cap. 1.  
sect. 3. Sud. Diton.

"SERVICE de chivaler." *Nota*, it appeareth by [a] the *Register*, that it is [b] said *unum feodum militis*, and not *feodum unius militis*, as it was said [c] by some of old; and so *duo feoda militis*, &c. and sometime these fees are called *feoda militaria* [d]. Our author, having before treated of homage fealty and escuage, now commeth to knight service itselfe. In *Domesday* it is thus recorded: *Episcopus Baiocensis ille qui tenent de Modardo, reddit ei 50 s. et servitium unius militis.*

"Chivaler," i. e. *equus*, knight, is a *Saxon* word, and by them written *cnite*. *Chivaler* taketh his name from the horse; because they alwayes served in warres on horseback. The *Latines* called them

(1) In L. and M. and the Pap. MS. there is the following addition: *Item si un home tient un maner de un auter per serveyce de chivaler, et il tient un auter maner de un auter home per un tiel serveyce, mez il tient l'un maner per priorite, &c. et l'auter maner per posteriorite, et adiesue file, et de vie, et les maners descendent al file adonques esteant deins l'age de 14 auns, et le seignour de que un dez maners est tenu per priorite seisis le garde del corps del heire et de le maner tenuz de luy, et l'auter seignour seisis le garde del auter maner tenuz de luy, en cest case quant la file vient al age de 14 auns, ele entrera en le maner tenuz per posteriorite comment que ele soit adonques desmarie. Car les parols de meme l'estatute de Westminster premier sont en tiel forme que en-*

*suyt. Les heires femels, puis que eles ayront complie age de 14 auns, et le seignour, a qui le mariage appent, celes ne voudra marier, mez per covetise de la terre celes voudra tener dismariez, purveu est que le seignour ne puisse aver ne tener per encheson de la mariage les terres de celes heirez females outer deux auns apres le terme dez avantdix 14 auns, &c. per queux parols il poet estre prove, que apres les 14 auns null doit aver les terrez en tiel case, &c. forsque celui, a qui le mariage appent, &c. et par ces que tiell mariage n'appent a celui, de qui la terre est tenuz per posteriorite, &c. tiell heire femel, quant ele vient al age de 14 auns, poet bien entre en tiel terre, que issint est tenuz per posteriorite, &c.*—See 35 H. 6. 52.



them *equites*, the *Spaniards cavalleros*, the *Frenchmen chivaliers*, the *Italians cavallieri*, and the *Germanes reiters*, all from the horse. It is necessary to be seene by what names this service of a knight is called. It is called [e] *Servitium forinsecum, quia pertinet ad dominum regem et non ad capitalem dominum, nisi cum in propria personâ profectus fuerit in servitio, et nisi cum pro servitio suo satisfeceris domino regi, &c.* Ideo forinsecum dici potest, quia fit et

[75. a.] capitur foris, sive extra servitium quod fit domino capitali. And it is called *scutagium*, as it appeareth [f] by Littleton and many authorities before recited; sometime *droit de espée*. Also it is called [g] *regale servitium, quia specialiter pertinet ad dominum regem. Ut si dicatur in carta, faciendo inde forinsecum servitium, vel regale servitium, vel servitium domini regis, quod idem est, &c.* And another saith: *Et sunt quedam servitia forinseca, quæ dici poterunt regalia, quæ ad scutum præstantur; et inde habemus scutagium, et ratione scuti pro feodo militari reputantur, &c.* So as in respect of him that doth it, it is called *servitium militis*; but in respect of him for and to whom it is done, viz. to the king, and for the realme, it is called *servitium regale, or servitium domini regis, &c.*

[h] In ancient time they which held by knights service were called *militēs, qui per loricas, &c. defendunt et deserviunt, &c.* and sometime this service is called *servitium hauberticum*. And in ancient time, such as held by knights service for the defence of the realme had many privileges granted to them by law: as for example, they might have a writ *de essend' quiet' de tallagio*, the effect whereof was [i], *Si Tho. filius Ranulphi terram suam teneat per servitium militare, sicut domino regi monstravit, tunc nullum ab eodem Tho. capient tallagium nec pro eo dando ipsum distringant, vel homines suos qui per consimile servitium teneant.* And this agreeth with the ancient charter of king Henry the first, before mentioned, which he made on the day of his coronation for the restitution of the ancient lawes. [k] *Militibus, qui per loricas terras suas defendunt et deserviunt terras dominicarum carucat' suarum quietas ab omnibus gildis, et omni opere, &c. concedo:* and the reason thereof is there yielded: *Sicut tam magno gravamine*

[75. b.] *allevati sint, ita equis et armis se bene instruant, ut apti et parati sint ad servitium meum, et defensionem regni mei.* But these privileges and quittances are discontinued, and the charge remaineth.

It is called commonly in [l] our bookes, *servitium militare, &c. or servitium militis*. And this service was created and provided for the defence of the realme, to performe which service the heires are not accounted in law able till the age of one and twenty yeares. Therefore during their minority, the lord shal have the custody of them, not for benefit onely, but that the lord might see, that they be in their yong yeares taught the deeds of chivalry, and other vertuous and worthy sciences.

[m] *Si hereditas teneatur per servitium militare, tunc per leges infans ipse, et hereditas ejus, &c. per dominum feodi illius custodientur, &c.* Quis putas, infantem talem in artibus bellicis, quas facere ratione tenura sua ipse astringitur domino feodi sui, melius instruere poterit, aut velit, quàm dominus ille, cui ab eo servitium tale debetur, et qui majoris potentie et honoris æstimatur, quàm sunt alii amici propinqui tenentis sui? Ipse namque, ut sibi ab eodem tenente melius serviatur, diligentem curam adhibebit, et melius in hiis cum erudire expertus esse censeatur quàm reliqui amici juvenis, &c. et revera non minimum erit regno accommodum, ut incolæ ejus in armis sint experti, nam audacter quilibet facit, quod se scire ipse non diffidit.

[e] Bract. lib. 2. fo. 36, 37.  
Britton, fol. 164, 165.  
Fleta, lib. 2. cap. 14.  
19 E. 2.  
Avovery 224.  
26. Ass. 66.  
31. Ass. 30.  
30 E. 3. 23.  
8 E. 3. 67.  
7 H. 4. 19.  
(Ante 68. b.)  
[f] Bracton, ubi supra.  
Fleta, lib. 3. cap. 14.  
[g] Britton, fol. 187.  
Bracton, ubi supra.

[A] Carta Hen. prim. Mat. Paris. Mirror, cap. 2. sect. 17.

[i] Rot. Claus. 19 H. 3. m. 22.

[k] Carta H. 1. in libro rub. fol. 41. in seaccario.

[l] Glanvil. lib. 7. ca. 9, 10.  
Fleta, lib. 1. ca. 8. & 9. & lib. 3. cap. 16, 17, &c.  
Bracton, lib. 2. cap. 16.  
Mirror, cap. 6. sect. 2.  
Britton, 168. (4. Inst. 192.)  
[m] Fortescue, cap. 44.

[n] Lamb. fol.  
136. a.

[n] Amongst the lawes of Saint *Edward* the Confessor, it is thus provided: *Debent enim universi liberi homines, &c. secundum feodum suum, et secundum tenementa sua arma habere, et illa semper prompta conservare ad tuitionem regni, et servitium dominorum suorum juxta præceptum domini regis explendum et peragendum.* And *William* the Conqueror confirmed that law in these words: *Statuimus et firmiter præcipimus, ut omnes comites et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti habeant et teneant se semper in armis ei in equis ut decet, et oportet, et quod sint semper prompti et parati ad servitium suum integrum nobis explendum et peragendum, cum semper opus adfuerit, secundum quod nobis debent de feodis et tenementis suis de jure facere, &c.* Out of these two lawes the studious and learned reader will gather divers notable things. And therefore if after the lord hath the wardship of the body and the land, the lord doth release to the infant his right in the seigniorie, or the seigniorie descendeth to the infant, he shall be out of ward both for the body and the land; for he was in ward in respect he was not able to doe those services which he ought to doe to his lord, which now are extinct, and *cessante causâ cessat causatum.* And our author saith, that the tenure by knights service draweth unto it ward, marriage, &c. so as there must be a tenure continuïng. As if the conuser in a statute merchant be in execution, and his land also, and the conusee release to him all debts, this shall discharge the execution; for the debt was the cause of the execution, and of the continuance of it till the debt be satisfied, therefore the discharge of the debt which is the cause, dischargeth the execution which is the effect.

See W. 1. cap. 48.  
the Second Part  
of the Institutes.  
(6 Co. 28.  
Post. 248.)

30 Ass. p. 7.  
(2 Ro. Abr. 404.  
Doc. Pl. 106.)

"*Et trait a luy gard, mariage, et reliefs.*" So as regularly there be sixe incidents to knights service, (viz.) two of honour and submission, as Homage and Fealtie; and foure of profit, viz. Escuage, whereof he hath treated before, Ward (*i. e.* wardship of the land), Mariage and Reliefs; of all which our author hath spoken. But there be other incidents to knights service besides these; [a] as *Aide pur faire fîts chivalier, et aide pur file marier, &c.* which at the common law were uncertaine, and were called *rationabilia auxilia*, because if they were excessive and unreasonable in the judgment of the court where they were questioned, they ought not to be paide: but now as well in the king's case, as in the case of the subject, they are by acts of parliament reduced to certaintie, which are worthy your reading (1).

[a] Grand. cust.  
de Norm. cap. 35.  
Regist. orig. fo. 87.  
Glanvil. lib. 9.  
ca. 8. 35.  
Fleta, lib. 2.  
cap. 40. & lib. 3.  
ca. 14.  
Mirror, ca. 1.  
sect. 3.  
Britton, fo. 55.  
& 70.  
F. N. B. 82. b.  
W. 1. ca. 35.  
25 E. 3. ca. 11.  
11 H. 4. 34.  
5 E. 3. 11.  
Vid. Sect. 110.  
[b] 8 H. 3. Præ-  
script. 38.  
Pasch. 21 E. 1.  
Coram rege Rot.  
43.  
Nota pro Hibernia  
Prior del St. Trini-  
tis de Dublin's  
case.

"*Gard,*" or *Ward*, in *Latine custodia.* And hereof the lord is called *gardian, custos*, and the *minor* is called a ward, or one in ward. [b] And albeit (as our author saith) knight service draweth with it ward, &c. yet by custome the heire of him that holdeth in socage, may be in ward.

"*Marriage,*" *Maritagium*, betokeneth, not onely the copulation of man and wife in mariage, but also (as in this place here) the interest of the gardian in bestowing of a ward in mariage, which the law gave to the lord; not for his benefit onely, but that he should match

(1) [See Note 38.]

match him vertuously and in a good family without disparagement, as shall be said hereafter, which is the principall foundation of his estate.

[c] "*Reliefe*," *Relevium*, is derived from the *Latine* word *relevare*; for so [d] ancient authors say, and give this reason: *Quia hereditas, qua jacens fuit per antecessoris decessum, relevatur in manus heredum, et propter factam revelationem facienda erit ab herede quedam præstatio, quæ dicitur relevium*. And in *Domesday* it is called *relevamentum* and *relevatio*.

The reliefe of a whole knight's fee is five pound, and so according to that rate; [\*] but the reliefes of earles and barons were uncertaine, and therefore were called *relevia rationabilia*; but the statute of *Magna Charta*, cap. 2. limits them in certaine, and mentioneth only a knight's fee. But I reade in the book of *Domesday*, quod *Tainus vel miles regis dominicus moriens pro relevamento dimittebat regi omnia arma sua, et equum unum cum sellâ et alium sine sellâ; quod si essent ei canes vel accipitres, præstabantur regi, ut si vellet acciperet*.

Since *Littleton* wrote [c] there is a good law made against fraudulent feoffments, gifts, grants, &c. contrived of fraud to hinder or defraud lords, &c. of their reliefes and heriots amongst other things, for the exposition of which statute reade the authorities quoted in the margent. And it is to be observed, that the words of the said act of 13 *Eliz.* are (*be it therefore declared, ordained, and enacted*) and therefore like cases, and in semblable mischief shall be taken within the remedie of this act by reason of this word (*declared*), whereby it appeareth what the law was before the making of this statute (2).

"*Son heire male*." [f] For regularly by the common law the heire shall not be in ward, unlesse he claime as heire by descent. The statute of *Merton*, *de hiis qui primogenitos feoffare solent*, [g] did helpe feoffments by collusion in certaine cases. And *Britton* saith, that *Robert de Walrand* a sage of the law did advise the great lords of the realme to make the said statute, which when it was past, the same act tooke his first effect in the heire of *Walrand's* own heire, whereof *Britton* maketh a speciall remembrance. But now [h] by the statutes of 32 and 34 *H. 8.* of wills, he which holdeth lands by knights service may by act executed in his life time, or by his last will in writing, dispose of two parts, as by the said acts appeareth. If he dispose all by act executed, then it shall stand good against the heire, so as nothing shall descend unto the heire. But in case [76. b.] of a devise by his last will, a third part shall descend to the heire, though all be devised away: and if the tenant leave a third part to descend, then the devise is good for the residue. [i] But these things require so many diversities grounded upon evident reasons, and are so plainly expressed in my Commentaries, as they (being very long) shall not need to be repeated here. [k] And that the tenure by knights service draweth to it ward marriage and reliefe, is of great antiquity, for so it was in the time of king *Alfred* (1).

"*Quant*

[c] Vid. Sect. 112.  
[d] Bracton, lib. 2. ca. 36. fol. 84.  
Fleta, lib. 1. ca. 10. & lib. 3. ca. 16. 17.  
Britt. ca. 60. 70.  
Glanvil. lib. 9. ca. 4. and lib. 7. ca. 9. Ockam. de differentiis teliorum. (Ante 69. b. Post. 83. a.)  
[\*] Ockam ubi supra.  
Bracton, lib. 2. fol. 69.

[c] 13 *Eliz.* cap. 5.  
17 *E. 3.* Reliefe 3.  
7 *E. 3.* lib. 11.  
3. Co. 80. &c.  
Twine's case.  
5. Co. 60.  
Gobche's case.  
6 Co. 18.  
Pakenham's case.  
10. Co. 50. b.  
See also the statutes of 3 *H. 7.* c. 4. & 50 *E. 3.* cap. 1.  
Vide Mich. 13 & 13 *Eliz.* Dyer 208.

[f] Brit. 168.  
Fleta, lib. 1. ca. 9.  
[g] Mert. ca. 6.  
(11. Rep. 23.)  
Bract. fo. 84.  
Britt. fo. 65.  
9 *H. 4.* c. 6.  
4 *H. 7.* ca. 17.  
27 *H. 7.* 90.  
Partridge's case.  
Pl. Com. 83.  
[h] 32 *H. 8.* ca. 1.  
34 *H. 8.* ca. 5.

(10. Co. 80.)  
[i] 3. Co. 25. 29.  
in Butler's case.  
6. Co. 76. in sir George Curzon's case. 8. Co. 163.  
Might's case.  
Eod. lib. fo. 171. in Vigil Parker's case  
[k] Mir. ca. 1. sect. 3.

(2) See a note on the subject of *relief*, post. 83. a.

[76. b.]

(1) This shews that in lord Coke's opinion

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the feudal tenures were settled here before the Conquest. But as to this controverted point, see note 1. of 64. a.

"*Quant tiel tenant mort.*" Here *Littleton* speaketh not of a dying seised by the tenant, for in many cases the heire shall be in ward, albeit the tenant died not seised, &c. nor in the homage of the lord. As if the tenant maketh a feoffment in fee upon condition, and the feoffor dieth, after his death the condition is broken, the heire within age entreth for the condition broken, he shall be in ward, and yet the feoffor had no estate or right in the land at the time of his death, but only a condition, and which was broken after his decease. [\*] But because the condition restoreth the tenant to the land in nature of a descent, (for he shall be in by descent) by the same reason shall it restore the lord to the wardship, seeing now (as *Littleton* saith) the heire of his tenant is within age, and not able to doe him service, and no default in the lord to barre him of his wardship.

(Co. 99.)

[\*] 39 E. 3. 36.  
 tit. Gard. 21.  
 23 E. 3.  
 Gard. 102.  
 11 H. 7. 12.  
 19 E. 3.  
 Gard. 114.  
 18. Ass. 18.  
 40. Ass. 36.  
 30 El. 302. 4 H. 6. 16, b. F. N. B. 143. 6 H. 4. 4. a.

[?] 7 H. 4. 12.  
 1 H. 7. 12.  
 28 E. 4. 7. 6.  
 40 E. 3. 43.  
 4. M. 136.  
 15 E. 4. 10, 11.

[?] And so I doe take it, that if the heire within age recover in a *dum non fuit compos mentis*, or *formedon en descender*, or remainder as heire, or such like, the heire shall be in ward; for these be stronger cases than the former; for here a right doth descend to the demandant, which right being by course of law restored to the possession of the heire within age, by consequence the lord is to have the wardship of him, but in the case of the condition, no right at all descended to the heire, as hath beene said.

33 E. 8. Gard. 168.  
 (2. Mo. Abr. 35.)

And so if tenant in taylor, the remainder in fee, maketh a feoffment in fee, and dyeth leaving the issue in taile within age, if the feoffee infeoffe the issue in taile, whereby he is remitted, he shall be in ward to the lord; for as he is restored to the title of the land as heire, so is the lord restored to his title of the wardship as lord of the fee. And as to this purpose herein I take no difference betwene a right of action and a right of entry descending, when by action the right of the land is lawfully recovered by the heire within age, to his tenant: and albeit he dyed not in his homage, yet there was a right of homage, and no default or laches was in the lord, or act done by him to prejudice himselfe thercof.

11 H. 7. 12.

But if one levie a fine executorie (as *sur grant et render*) to a man and his heires, and he to whom the land is granted and rendred, before execution dieth, his heire being within age entreth, he shall not be in ward, for his ancestor was never tenant to the lord, and so there is a manifest diversitie between this and the other cases. *Et sic de ceteris.*

13 Ed. Dyer 228.

But if the tenant maketh a feoffment in fee of lands holden by knights service to the use of the feoffee and his heires, untill the time that the feoffor pay to the feoffee or his heires a hundred pounds, for the which a time and place is limited; the feoffee dyeth, his heire within age, the lord shall have the wardship of the bodie of the heire, and of the lands of the feoffee, conditionally, for he cannot have a more absolute interest in the wardship, than the heire hath in the tenancie: therefore if the feoffor pay the money at the day and place, and entreth into the land, in this case both the wardship of the bodie and lands is devested, because the lord had no absolute interest in either of them, but doth depend upon the performance or not performance of the condition.

(Post 248. a.)

[\*] 12 H. 4. 16.  
 per Tairning.

[\*] So if the conusor of a fine executorie of lands holden by knights service dyeth, his heire within age, the lord shall have the wardship of the bodie and land: but if the conusor entreth, the heire is disherited, and the lord hath lost the whole benefit of his wardship.

If

If the disseisee dyeth, his heire being within age, [m] the lord shall have the wardship of the heire of the body of the disseisee. [n] But put the case, that in that case the disseisor dieth seised, and his heire within age, the lord may seise the wardship of his heire also, and of the land also: but the doubt is, whether the heire of the disseisee shall, after the descent to the heire of the disseisor, continue in ward, for that after the descent the heire of the disseisor is become his lawfull tenant, and the heire of the disseisee is not tenant unto him untill he hath recovered the land.

If *cestui que use* before the statute of 27 H. 8. had dyed, his heire within age, the lord [o] should have had the wardship of his heire; and if the feoffee had dyed, his heire within age, the lord should have had the wardship of his heire also, and so a double wardship for one and the same land, the one by the statute of 4 H. 7. the other by the common law.

[p] Tenant by knights service maketh a gift in taile, the remainder in fee, tenant in taile maketh a feoffment in fee, and dyeth, his heire within age, the lord shall have the wardship of him; and if the feoffee dieth, his heire within age, the lord shall have the wardship also of his heire, and of the land.

14 H. 4. 39. 1 H. 5. Grant 43. 5 E. 4. 3. 7. E. 4. 27. 15 E. 4. 13. 3 E. 2. Avow. 181.

[77. a.] If tenant by knights service maketh a gift in taile, and [q] the donee maketh a feoffment in fee, and the donee dyeth, his heire within age, the donor shall have the wardship of him; because he is his tenant in right. [q] But if the feoffee dieth, his heire within age, the donor shall not have the wardship of his heire, but the lord paramount; because he is tenant *in fuit* to him; neither shall the donor avow upon the feoffee or his heire for the services due unto him, because he must in his avowry shew the reversion in fee to be out of him by the feoffment, and consequently the services incident to the reversion are also out of him, but he shall avow upon the donee and his issues: [r] and thus are all the bookes that seeme to be at variance, either answered or reconciled.

[a] "*La terre tenus de luy, &c.*" Littleton here speaketh of lands holden of a subject: for if a man hold land of the king by knights service *in capite*, and other lands of other lords, and dieth, his heire within age, the king shall have the wardship of all the lands by his prerogative: and this was due to the king by the common law, the fees of certaine excepted, as in the statute of *prærogativa regis*, cap. 1. appeareth.

But if a man holdeth lands of the king by knights service, as of an honor or mannor, &c. [b] in that case the king shall onely have the lands holden of him, and not of any other. Yet by reason of tenures of the king by knights service of certaine honours, (while they were in the king's hands) the king (as some have said) had (as it were by prescription) his prerogative, viz. *Raleigh hage net bonony* and *Peverel*, and so of lands holden by knights service of the duchy of Lancaster in the county palatine (1).

When

[m] 41 E. 3. 26.

[n] 15 E. 4. 11.

[o] 14 H. 3. 3.  
4 H. 7. cap. 17.

[p] 41 E. 4. 26.  
tit. Avowrie 264.  
30 H. 6. 3.  
48 E. 3. 8. b.  
30 E. 3. 26.  
31 E. 3. tit.  
Gard. 116.  
18 E. 3. 7.  
3 E. 2. Avow. 181.

(2 Ro. Abr. 34.)

[q] So was it holden. Tr. 18. El. in Com. Banco, per Cur. which myselfe heard and noted, in sir Thomas Wync's case.

[r] So was it resolved in sir Tho. Wync's case *ut supra*.

[a] Glanv. lib. 7. cap. 10.  
Bract. lib. 2.  
fo. 85, 86, 87.  
Brit. l. 3. c. 2.  
Fleta. l. 1. c. 20.  
9 H. 3.  
Prerog. 25.  
31 H. 3. lib. 20.  
Rot. Phinim.  
6 Joh. 8. tit.  
Prerog. Reg. c. 12.

[b] Bract. ubi supra. Mag. Carta, c. 31.  
1 E. 6. ca. 4.  
5 E. 3. 5.  
47 E. 3. 21.  
30 H. 6. lib. tit. Livery 23.  
28 H. 6. lib. 25.  
(2 Ro. Abr. 34.)

(1) [See Note 39.]

[c] 6. Co. 173.  
Hale's case.  
38 H. 8. Br.  
tit. Livery 60.  
Vol. Sect. 164.  
(F. N. B. 263 E.)

[c] When an heire hath bin in ward to the king by reason of a tenure *in capite*, after his full age he must sue livery, which is halfe a yeare's profit of his lands holden. But if he be of full age at the time of the death of his ancestor, then he shall pay for lands in possession a whole yeare's profit for *primer seisin*: but if it be of a reversion expectant upon an estate for life, as tenant in dower, tenant by the curtesie, or tenant for life, then he shall pay but the moiety of one yeare's profit.

[d] 1 El. Dier 162.

[d] If the heire be in ward by reason of a tenure of an honour or mannor, (except as before) he shall not sue livery, but an *ouster le maine cum exitibus*, albeit he never made tender. [e] And if he be of full age, the king shall have no *primer seisin*, but reliefe. But where the tenure is *in capite*, there the king shall have the meane profits untill the tender be made; and if the tender be made, and not duely pursued, the king shall also have all the meane profits.

[e] 38 H. 8. tit.  
Liv. Br. 62.

[f] 38 H. 8.  
Liv. Br. 60.  
48 E. 3. 11.  
38 H. 6. 22.  
Stand. 13. b.  
[g] 30 El. Dy. 302.  
F. N. B. 259. b.

[f] He that holdeth of the king by socage in chiefe, and dieth, his heire of full age, the king shall have livery and *primer seisin* onely of the lands so holden, and not of the lands holden of others.

[g] But if the heire of such a tenant in socage in chiefe be within the age of fourteene at the death of his ancestor, he shall neither sue livery, nor pay *primer seisin*, either then or any time after: and the reason thereof is, for that the custodie of his body and lands in that case belong to the *prochein amy*, as gardian in socage. [h] Neither shall the king have *primer seisin* of lands holden in burgage, (as some have said) for that it is no tenure *in capite*.

[A] F. N. B. 263.  
7 E. 4. 17.  
Stand. Prer.  
13. Br. tit.  
Liv. 64.

Note, there is a generall livery, and a speciall livery. A generall livery hath two properties:

First, it is full of charge to the heire, for he must have an office in every county where he hath land, or else he cannot sue a generall livery, and he must sue out his writ of *estate probanda*, &c.

[f] 46 E. 3. 33.  
47 E. 3. 21.  
21 H. 6. 28. b.  
33 H. 6. 20.  
50. Am. 8.  
Pl. Com. Count.  
of Leicester's  
case. 44 E. 3. 1.  
& 26. 12 H. 2.  
Liv. 28.  
2 H. 7. fol. 14.

[i] The second property is, that it is full of danger: first, it concludeth the heire for ever after to denie any tenure found in the office: secondly, if livery be not sued of all and of every parcell which the king ought to have, whether it be found in the office or not found (for a generall livery could not be sued by parcels) the livery is void, and the king may reseise the lands, and be answered of the meane profits. So it is if the office be insufficient, or the process whereof the livery was made be insufficient, or the like, the king shall reseise, as is aforesaid. [a] Therefore for the ease of the heire, and for avoyding of such danger, the heire for the most part sueth out a speciall livery, which containeth a beneficiall pardon and saveth the said charges, and preventeth the said conclusion, and the other dangers; which being of grace, and not of right, as the generall livery is, the king may well and justly take more for a speciall livery, than for a generall, for the causes aforesaid, but ever with such moderation as the heire may cheerfully goe through therewith.

[a] 1 H. 4. 6. b.  
37 H. 6. Estop.  
Br. 1. 216.  
7 E. 6. ib. 222.  
Scurfield's case.  
Tr. 8. Ja. in cur.  
Ward. 23 El.  
Dier 377.  
38 H. 8. Br.  
tit. Liv. 66.

Note, that a livery is in nature of a restitution, which is to be taken favourably; for if livery be made of a mannor *cum pertinentiis*, the heire shall thereby have the advowson appendant. Otherwise it is in grants by letters patents.

41 E. 3. 6.  
6 E. 6. 6.  
27 Am. 48.  
Pl. Com. 202.  
30 El. Dyer 306.  
(10 Co. 64. a.)

Since the time that *Littleton* wrote [c] there is a court of wards and liveries erected by authority of parliament concerning the order of the king's wards, &c. to be holden before the master of the wards and the councill of that court appointed by those acts. This hath

[c] 38 H. 8. 40.  
38 H. 8. cap. 21.  
(4 Inst. 186.)

[77. b.] hath made such a manifold alteration, as were too long here to be inserted, and doth belong to another treatise mentioned in the Epistle of the Jurisdiction of Courts, where it were necessary, that the true jurisdiction of that court should be set downe, a matter of no great difficulty, seeing it began so late by authority of parliament. And since *Littleton's* time, [d] there is a right profitable statute made concerning the finding of offices and other things, not onely concerning the king's wards, or their rights and possessions, but some other provisions very beneficiall for the subject, in all to the number of 12. [c] 1. That such persons as hold for tearme of yeares, or by copy of court roll, or have any rent common or profit *apprender* out of any lands found in any office, whereby the king is intituled to the wardship of the lands or tenements, or to the forfeiture of the lands or tenements upon attainer of treason, felony, *præmunire*, or any other offence, yet may they have, hold, enjoy, and perceive their severall estates, interests, and profits, although they be not found in the office. And this being a beneficiall law, the estates of tenant by statute staple merchant and *elegit*, and executors that hold lands for payment of debts, are taken to be within the benefit of the clause: [f] and so is, a doubt in 14 *El. Dier* cleared.

2. Where it is found, that the heire is of fewer yeares than in truth he is, he shall not be concluded hereby, [g] but every such heire at his very full age may prosecute a writ of *estate probandâ*, and sue his livery or *quater le maine*: in which case he had no remedy by the common law.

[a] 3. Where one person or more be found heire, where another person is heire, the partie grieved had no remedy.

Sadler's case. Statut. Prærog. 28. h. 52. 5. E. 4. 4. 16 E. 4. 4. 1 H. 7. 14. 9 H. 7. 12. 4 H. 7. N. B. 202. 12 H. 2. Livery 28. F. N. B. 233. 7 Co. 44, 45. Ken's case.

4. Or where one person or more be found heire in one county, and another person or persons found heire in another county, there could have been no interpleading.

5. Or if any person be untruly found by office lunaticke, or idiot, or dead, the party grieved may traverse the said offices; and you may read in *Ken's* case how the office shall be traversed upon this act.

[b] 6. Where it is untruly found by office, that any person attainted of treason, felony, or *præmunire*, is seised of any lands, &c. the party grieved, having just title of freehold, shall have his travers or *monstrans de droit* (without being driven by this double matter of record to his petition of right as he was before this statute) which is much more speedy than the petition; for upon the petition there be foure writs of search, and every one must have 40 dayes before the serving, and now but two writs of search.

[c] 7. Where an office is found by these words or the like, *quod de quo vel de quibus tenementa prædicta tenentur juratores præd' ignorant*, or holden of the king *per quæ servitia juratores ignorant*, it shall not be taken for any immediate tenure of the king in chiefe, but in such cases a *melius inquirendum* to be awarded, as hath beene accustomed of old time. This branch hath beene well [d] expounded; for if the first office finde a tenure of the king *per quæ servitia*, &c. yet if upon the *melius inquirendum* the tenure be found of a subject, the first office hath lost his force *per sensum hujus statuti*, and need not be traversed, and the *melius*, &c. is in nature of the *diem clausit extremum*.

[d] 2 E. 6. ca. 9.  
(9 Co. 10.)

[c] 4 E. 4. 23.  
39 H. 8. tit.  
Entire Congest.  
Br. 124.

[f] 14 Eliz.  
Dier. fo. 319.

[g] 5. Mar.  
Dier 125.

[a] 24 E. 3. 31.  
38; 9 H. 6. 18.  
19 E. 4. 16.  
30 Ass. 28.  
4 Co. 86. & 60.  
7. 15. 8 H. 7. 11.

[b] 4 E. 4. 23.  
10 H. 6. 19.  
4 Co. 86, &c.  
Sadler's case.  
32 H. 8. Entire  
Cong. Br. 125.  
14 E. 3. cap. 14.

[c] Vide 6. Co.  
Wheeler's case.

[d] 12 Eliz.  
Dier 1. 202. a.  
8 Co. 168. Parit  
Stoughton's case.

*extremum* or *mandamus*, &c. And this was but a declaration of the ancient common law, as by the words of the statute (*as hath been accustomed of old*) it appeareth; but if upon the *melius* it be found againe as uncertainly as before is said, then it is in judgement of law a tenure *in capite*, and so it was before the making of this act, and so are the bookes that speake hereof to be intended; but if upon the *melius* a tenure be found of the king *ut de manerio per qua servitia*, &c. it shall be taken for knights service.

8. Where it is found that lands, &c. are holden of the king immediately, where in truth they are holden of a common person and not of the king immediately, and that the heire is within age, such heire within age shall have his traverses, &c. which he could not have had by the common law.

9. The meane lords of whom the lands are holden, which the king hath by his prerogative during the minority of the heire, shall receive and take such rents as are due unto them by the hands of such of the king's officers as receive the profits of the same lands, where before that act, the lords used to spare the rents due, &c. during the king's possession, and after livery sued charged the heire with all the arrearages.

10. There is a provision for offices found before the statute or before the 20th day of *March* next after the act.

11. A speciall clause is, that a *scire fac'* shall be awarded upon every travers by force of this act, and where the party was put to his petition, there upon the travers there shall be two writs of search granted.

12. And lastly, if judgment shall be given against the king upon a travers by virtue of this act, all former rights appearing of record are saved to the king. But albeit these points are most necessary to be knowne, yet let us now returne to *Littleton*.

*Littleton* warily and materially (treating of a common person) saith, *tenus de luy*, holden of him, for he shall have nothing in ward but that which is holden of him. But the king by his prerogative shall not onely have such lands and tenements, [78. a.] which (as hath been said) the heire of his tenant by knight service *in capite* holdeth of others, but such inheritances also as are not holden at all of any, as rent charges, rent secke, fayres, markets, warrens, annuities, and the like; and so is the law cleerely holden at this day, as it hath beene resolved; and so experience teacheth, that the king by his prerogative given to him by the ancient common law shall have those inheritances not holden, and so the *quero* made by [o] *Staundford* is cleered and made without question.

The law is changed since *Littleton* wrote in many cases both for the marriage of the body, and for the wardship of the lands, and a farre greater benefit given to the lords then the common law gave them, and some advantage given to the heires, which before they had not, which shall be touched briefly.

If the father had made an estate for life or a gift in taile of lands holden by knights service to his eldest sonne, or other heir apparent within age, the remainder in fee to any other, and dyed, the heire should not have beene in ward; for this was out of the statute of *Merlebridge*. But at this day the heire shall be in that case in ward for his body, and a third part of his land.

[a] So if the father had infeoffed his eldest sonne within age and a stranger and the heires of the sonne, and died, the sonne should have beene out of ward; but at this day he shall be in ward for

13 Eliz. Dier 306.  
4 H. 6. 13.  
10 H. 4. 2. b.

15 H. 4. 12.  
46 E. 3. 12.  
21 H. 6. 11.  
3 H. 7. 5.

[o] Staunf. Prer.  
2. 2.

Merlebridge,  
cap. 1.  
Pl. Com. 82.  
27 H. 8. 10.  
23 H. 6. 14.

[a] 31 F. 3.  
Collusion 29.  
33 H. 6. 14.



for his body, and for a third part of his moiety. [b] So if the father had infeoffed any of his younger sonnes or others for the making of his wife a joynture, or for the advancement of his daughters, or for the payment of his debts, and after infeoffe and convey the land to his heire and dyed, his heire within age, his heire should not have beene in ward; because he was bound by the law of nature and nations to provide for them; but now in all these cases the heire shall be in ward for his body, and a third part of the land, and all this groweth by construction upon the statutes of 32 and 34 H. 8. [c] But if either the eldest sonne, or any of the younger sonnes purchase lands of his father, which are holden by knights service, *bond fide*, for the reasonable value, this is out of those statutes, and the heire shall neither be in ward, nor pay *primer seisin*.

And in all the cases abovesaid, (for-example) if a feoffment be made to the use of his wife for life, or to the use of any of his younger sonnes for life, or to the use of some persons for life for payment of debts, and upon all these estates a remainder is limited over, if the wife or tenant for life dye in the life of the father, [d] or if it be conveyed to the use of the wife or younger children in fee, or fee-taile, or in fee for payment of debts, and these lands are conveyed away in the life time of the father, after the decease of the father no wardship, &c. accrueth by force of any of the said statutes, for such estates must continue till the title of wardship doe grow (1).

[e] If the father convey his lands holden by knights service either of the king or of any meane lord to his middle sonne in taile, the remainder to the youngest sonne in fee, and dyeth, the eldest being within age, and the king or lord seize the body and two parts of the land, if the middle brother dye without issue, the king or the lord shall not have any benefit of the statute against him in remainder; for the statute was once satisfied, and the statute extendeth not to him in remainder.

[f] If there be a grandfather, father, and divers sonnes, and the grandfather in the life of the father convey his lands holden by knights service to any of the sonnes, this is out of the statute of 32 H. 8. and if the grandfather die, there is neither wardship nor *primer seisin* due; for the father hath the immediate care of his sons (2). But if the father be dead, then the care of them belongs to the grandfather, and then if the grandfather convey any of the lands to any of the sonnes, it is within the said statute; [g] and a conveyance to the use of any of his collateral blood, which is not his heire apparent, is out of the said statute. And so are conveyances either by father or mother to or to the use of bastard children out of the statute; for *qui ex damnato coitu nascuntur, inter liberos non computantur*. And the preamble speaketh of lawfull generations. If a man seised of lands holden in socage convey them to the use of his wife, or of his children, or payment of his debts, and after purchase lands holden by knights service *in capite*, and dieth, his heire within age, the king shall have no part of the socage land. [h] But if in that case he had by his will in writing devised his socage lands in fee, and after purchased lands holden *in capite*, and dieth, the king shall have so much of the socage lands as will make a full third part of all.

[b] 33 H. 6. 14.  
27 H. 8. 7.  
6. Co. 76. 77.  
Sir George Curson's case.  
30 Eliz. 200.  
3 Eliz. 198.  
20 Eliz. 361.  
19 Eliz. 276.  
5. Marie 158.

[c] 10. Co. 83.  
Leonard Lovey's case.

[d] 2. Co. 91.  
Bingham's case.  
6. Co. ubi supra 84.  
8. Co. 165.  
Digby's case.

[e] 14. Eliz.  
Dier 308.  
3. Marie  
Dier 130.  
2. Co. 93, 94.  
Bingham's case,  
and Northcot's case.  
10. Co. 80. b.  
Leon. Lovey's case.

[f] 6. Co. 77.  
Sir George Curson's case.  
2 Eliz. Dier 181.  
8 Eliz. Dier 352.

[g] 10. Co. 83.  
Leon. Lovey's case. 18. Eliz.  
Dier 388.

[h] Leon. Lovey's case; ubi supra.  
Butler and Baker's case,  
3. Co. 28, &c.

(1) Vid. Trin. 8 Jac. *Ley 21. Allcock's case.* Hal. MSS.

(2) [See Note 40.]

all. The benefits, that grew to the subject by those acts of parliament, were, that tenants in fee simple might devise their lands by their last wills in writing in such manner and forme, as by the said acts appeareth; also that the father might infeoffe his eldest sonne or other heire lineall or collaterall of his lands holden by knights service, and two parts of the lands shall be out of ward. And in \**Might's* case you shall reade excellent matter of estates made upon collusion (3).

And both the statutes of 32 and 34 H. 8. concerning wills and wardships are many wayes prejudiciall to the heires; as, taking one example for many, if tenant by knights service make a [78. b.] feoffment in fee to the use of his wife and her heires, or to the use of a younger sonne and his heires, or wholly for the payment of his debts; in these cases, although nothing at all of the lands so holden descend to the heire, but he is disinherited of the same, yet his body shall be in ward. But this for a little taste may suffice. More hereof you may reade in my Reports in the several cases noted in the margent.

“*Pleine age.*” Full age regularly is one and twenty yeares.

“*Entendement de ley.*” *Entendement, i. e. intellectus*, the understanding or intelligence of the law. Regularly judges ought to adjudge according to the common intendment of law.

By intendment of law every parson or rector of a church is supposed to be resident on his benefice, unlesse the contrary be proved.

Of common intendment one part of a mannor shall not be of another nature than the rest.

Of common intendment a will shall not be supposed to be made by collusion. *In facto quod se habet ad bonum et malum, magis de bono, quam de malo lex intendit. Lex intendit vicinum vicini facta scire. Nulla impossibilia aut inhonesta sunt præsumentia, vera autem et honesta, et possibilia. Lex semper intendit quod convenit rationi.* As in this case, the gardian shall have the custody of the land untill the heire come to his full age of one and twenty yeares; because by intendment of law the heire is not able to doe knights service before that age, which is grounded upon apparent reason. There note, that the full age of a man or woman to alien, demise, let, contract, &c. is one and twenty yeares, the civill law five and twenty yeares, for then the *Romans* accounted men to have *plenam maturitatem*, and the *Lombards* at eightene yeares.

“*Si le heire ne soit marie al temps del mort de tiel auncester, &c.*” *Auncester* is derived of the *Latine* word *antecessor*, and in law there is a difference between *antecessor* and *prædecessor*. For *antecessor* is applied to a natural person, as *I. S. et antecessores sui*; but *prædecessor* is applied to a body politique or corporate; as *Episcopus London. et prædecessores sui. Rector de D. et prædecessores sui, &c.*

“*Mes si tiel tenant devie son heire female esteant del age de 14 ans, &c.*” And the reason, as I finde in antiquity, wherefore the law gave the marriage of the heire female if she were within the age of fourteene,

\* 2 Co. 163.  
Might's case.

Leon. Lovey's  
case, ubi supra.  
23 Edm.  
Dier 367.

32 E. 3.  
Gard. 61.  
3 H. 5. 4.  
(6 Co. 30.  
Ante 73. a.  
Post. 314. b.)  
30 H. 6. 2.  
31 E. 3. 33. a.  
37 H. 2. fo. 10.

Vide Britton,  
fol. 169.

Glanvil lib. 7.  
cap. 1. Mirrour  
cap. 5. Sect. 2.  
Britton, fol. 168. b.  
39 H. 6. cap. 2.

fourteene, and that she should not marry herself, was, *pur ceoque les heires femalcade nostre terre ne se marieront a nous enemies, et dount il nous coviendroit leur homage prendre, si eux se puissent marier a leur volunt.* This is a speciall age for an heire female to be out of ward, if she attaine unto it in the life-time of her ancestor; for at that age she may have a husband able to doe knights service. A woman hath seven ages for severall purposes appointed to her by law: as, seven yeares for the lord to have aid *pur file marier*; nine yeares to deserve dower; twelve yeares to consent to mariage; until fourteene yeares to be in ward; fourteene yeares to be out of ward if she attained thereunto in the life of her ancestor; sixteene yeares for to tender her mariage if she were under the age of fourteene at the death of her ancestor; and one and twenty yeares to alienate her lands goods and chattels.

A man also by the law for severall purposes hath divers ages assigned unto him, viz. twelve yeares to take the oath of allegiance in the torne or leet; fourteene yeares to consent to mariage; fourteene yeares for the heire in socage to choose his gardian, and fourteene yeares is also accounted his age of discretion; fiteene yeares for the lord to have aid *pur faire fitz chivaler*; under one and twenty to be in ward to the lord by knights service; under fourteene to be in ward to gardian in socage; fourteene to be out of ward of gardian in socage; and one and twenty to be out of ward of gardian in chivalrie, and to alien his lands goods and chattels.

*"Mes si tiel heire female soit deins l'age de 14 ans et nient marie, &c. le seignior avera la gard del terre."* But put case that the lord cannot have the wardship of the land, as if the lord before the age of fourteene granteth over the wardship of the body, in this case the grantee of the body cannot enjoy the benefit of the two yeares, because he cannot hold over the land, and the lord which hath the wardship of the land only should lose the benefit of the two yeares, because he hath the lands onely, and cannot tender any mariage; therefore in this case the heire female shall enter into her land at her age of 14 yeares. So if a tenant holdeth of one lord by priority, and of another by posteriority, and dieth, his heire female within the age of 14 yeares, the lord by posteriority shall have the lands but untill her age of 14 yeares, because the mariage belongeth not to him. Also if the lord marieth the heire female within the two yeares, her husband and she shall presently enter into the lands: for, *cessante causa, cessat effectus; et cessante ratione legis, cessat beneficium legis.*

[79. a.] If the lord tender a convenable mariage to the heire within the two yeares, and she mary elsewhere within those two yeares, the lord shall not have the forfeiture of the mariage; for the statute giveth the two yeares onely to make a tender.

*"Et si le seignior deins les dits 2 ans ne luy tender tiel mariage, &c. donque el al fine del dits 2 ans poet entrer, et ouste le seignior."* This is so evident, as it needeth no explication.

*"Mes si tiel heire female soit marie deins l'age de 14 ans en la vie son ancestor, et son ancestor devie el estant deins age de 14 ans, le seignior n'avera la gard forsque de la terre jusque al age de 14 ans, &c."* Note, albeit the heire female be married at the age of twelve yeares in the life of her ancestor, (at which age she may consent to matrimony) to a man of full age, that is able to doe knights service, yet if the ancestor die before her age of fourteene, the gardian shall have

35 H. 6. 40.  
Bracton, lib. 3.  
cap. 37.  
(1. Ro. Ab. 349.  
6. Co. 73. b.)

34 E. 1. Stat. 3.  
Glanvil. lib. 7.  
cap. 9. Dier &  
Marie 102.  
Bracton, lib. 2.  
cap. 37.  
F. N. B. 303.  
(1. Ro. Ab. 137,  
138.)

35 H. 6. 42.  
St. Gard. 71.  
Scanford. 3. b.  
F. N. B. 255. 263.  
35 H. 6. 40.

Bracton, fol. 160.  
35 H. 6. 42.

35 H. 6. 42.  
35 H. 6. tit.  
Gard. 71.  
6. Co. 71. the lord  
Darcie's case.

F. N. B. 143.

have the land untill her age of fourteene, because (as hath beene said) that is the time appointed by the common law. And so if the heire male be married in the life of the ancestor at his age of fourteene yeaeres, and the ancestor dieth, the lord shall have the land untill the ward commeth to the age of one and twenty.

*"Car deo est hors del case del dit statute, intant que le seignior ne poet tender mariage a luy que est marie."*

*Natura non facit vacuum, nec lex supervacuum.* The law doth never enforce a man to do a vaine thing.

And where the said statute of *W. 1.* giveth unto the lord the said two yeaeres, thereby is implied, that if he dyeth within the two yeaeres, his executors or administrators shall have the same. For when the statute vesteth an interest in the lord, the law giveth the same to his executors or administrators. Then put case, that a lord hath the wardship of the bodie and land of an heire female, and maketh his executor, and dyeth before her age of fourteene yeaeres, whether the executor shall have the two yeaeres, because the executor is not lord. But I take it, the executor having the wardship of the body and land, shall in that case have the two yeaeres, for that they were vested in the lord (1).

It is further provided by the said statute, that if the lord tender a convenable mariage to the heire female within the said two yeaeres, and the heire female refuseth, then the lord shall hold the land untill her age of one and twenty yeaeres, and further untill he hath levied the value of her mariage. But if the lord doth not tender a mariage within the two yeaeres, he shall lose the value of the mariage, and content himselfe with the two yeaeres value.

*"Car devant le dit statute, &c. sicome appert par le rehearsall et parols de le dit statute."* *Nota*, the rehearsall or preamble of the statute is a good meane to find out the meaning of the statute, and as it were a key to open the understanding thereof (2). The tender of a mariage to an heire female before the age of fourteene is void, which must be understood where the lord may hold the land for the said two yeaeres, for then the statute appointeth the time of the tender; but where the lord cannot have the two yeaeres, he may tender a mariage to the heire female at any time after the age of twelve and before fourteene, for so he might have done at the common law.

## Sect. 104.

**N**OTA, que le pleine age de male et female, selonque le common parlance, est dit l'age de 21 ans. Et l'age de discretion est dit l'age de 14 ans; car a tiel age, le enfant que est marie deins tiel age a un feme, puit agreer a tiel mariage ou disagreeer.

**N**OTE, that the full age of male and female, according to common speech, is said the age of 21 yeaeres. And the age of discretion is called the age of 14 yeaeres; for at this age, the infant which is married within such age to a woman, may agree or disagree to such mariage.

(1) See 6. Co. 74. a.

(2) [See Note 42.]

**O**F full age, which is the age of one and twenty, and of the age of discretion, which is the age of fourteene (3), somewhat hath beene spoken before (4). But now to the point of agreement or disagreement in this case. The time of agreement, or disagreement, when they marrie *infra annos nobiles*, is for the woman at 12 or after, and for the man at fourteene or after, and there need no new mariage, if they so agree; but disagree they cannot before the said ages, and then they may disagree, and marie againe to others without any divorce; and if they once after give consent, they can never disagree after (1). If a man of the age of fourteen marry a woman of the age of ten, at her age of twelve he may as well disagree as she may, though he were of the age of consent; because in contracts of matrimony, either both must be bound, or equal election of disagreement given to both; and so *è converso*, if the woman be of the age of consent, and the man under (2).

(Ante 78. b.)  
6 Mar. Gard.  
Br. Pl. ultimo.  
39 E. 3. 32, 33.  
Prer. Reg. c. 6.  
Tr. 24 Eliz.  
Rot. 842. in bank  
le roy Banister's  
case.

(1. Ro. Abr. 341.  
3. Inst. 90.)

## Sect. 105.

**E**T si le gardein en chivalrie marie un foits le garde deins l'age de 14 ans a un feme, et puis s'il al age de 14 ans disagree a le mariage, il est dit per ascuns, que l'enfant n'est pastenuz per le ley d'estre autrefois marie per son gardeine, pur ceo que le gardeine avoit un foits le mariage de luy, et pur ceo il fuit hors de son garde quant al garde de son corps. Et quant il avoit un foits le mariage de luy, et un foits fuit hors de son garde, il n'avera plus avant le mariage de luy (3).

**A**ND if the gardian in chivalrie doth once marie the ward within his age of 14 yeares to a woman, and if afterward at his age of 14 yeares he disagree to the mariage, it is said by some, that the infant is not tied by the law to be againe married by his gardian, for that the gardian had once the mariago of him, and because he was once out of his ward as to the ward of his bodie. And when he had once the mariage of him, and he was once out of his wardship, he shall no more have the mariago of him.

**I**T is a maxime in law, *Quodd dominus non maritabit minorem in custodia sua nisi semel*. And another saith, *Si semel legitimè nupt fuer', &c. postmodum non tenebuntur sub custodia dominorum esse*. Albeit this mariage is *de facto*, and not *de jure*, and though the disagreement dissolveth it *ab initio*, yet the lord shall never have the mariago of him.

13 E. 1.  
Gard. 137.  
Brit. fo. 109. acc.  
Glauvil. lib. 7.  
cap. 12.  
27 H. 6. Gard. 118.  
27 H. 6. Gard. 118.

And so if the gardian marieth his ward to a woman, and after the mariage is dissolved by reason of a precontract (4), yet the gardian shall never have the mariage of the ward againe.

But if one ravisheth a ward from the lord and marieth him within the age of consent; in that case, if the lord taketh again his ward, and he at the age of consent disagreeeth to the mariage, the lord shall have the mariage of him, for he never had it before.

27 H. 6. Gard. 118.

So

(3) [See Note 43.]

(4) To lord Coke's account of the several ages of a man and woman, which is given in fol. 78. b. add l. Hal. Hist. Pl. C. 17.

[79. b.]

(1) [See Note 44.]

(2) [See Note 45.]

(3) In L. and M. the words *quare de hoc* are added.

(4) [See Note 46.]

F. N. B. 243.

7 H. 6. 11.

[a] 30 E. 1.  
gard. 156.  
13 E. 1.  
gard. 138.  
21 E. 3. 19.  
20 E. 3.  
gard. 41.  
Temp. E. 1.  
Briden 128.  
35 H. 6. 46.  
7 H. 6. 11.  
Vide Prem.  
Reg. cap. 6.  
13 H. 3.  
gard. 147.  
Statut. prem.  
26, 27.  
[b] 27 H. 6.  
gard. 118.  
F. N. B. 143. m.  
19 E. 3. judgement  
133.  
45 E. 3. 16.  
[c] 47 E. 3. tit. Ac-  
tion sur le statute  
36. and the bookes  
abovesaid.

[d] 7 H. 6. 11. ad-  
judged in the  
bookes at large.

So likewise, if the ancestor marieth his heir apparent, *infra annos nobiles*, and dieth his heir within age, the ward disagreeeth, the gardian shall have the wardship of him. The same law it is in the same case, if the wife dyeth before the age of consent, the lord shall have the marriage of the heir.

And so note a diversity when the ward is married by the ancestor or by a ravisher, and when by the gardian himselfe. [a] For if the ancestor marie his heir apparent *infra annos nobiles* and dyeth, in this case, if the marriage be dissolved by disagreement either of the ward or of his wife, the gardian shall have the marriage of him. [b] And so it is if a ravisher marry a ward *infra annos nobiles*, and the marriage is dissolved, *ut supra*, the gardian shall have the marriage. If the heir male in ward of the age of tenne yeares be married without the consent of the lord, he may tender unto the heir *infra annos nobiles* a marriage, albeit he be so married; and if he refuse, and agree to the former marriage, the lord shall have the forfeiture of his marriage, as it hath bene holden. But otherwise it is [c] (saith *Littleton*) where the gardian himselfe marrieth the ward, *ut supra*. And the reason of the diversitie is, because in this case the gardian had once the marriage of him, but so had not he in either of the other cases; and it is a maxim in law, *quod dominus non maritabit pupillum nisi semel*.

It appeareth upon consideration of all the bookes afore-  
said, that where the ancestor marrieth his heir apparent [80. a.]  
within the age of consent, and dyeth, the infant still being within  
the age of consent, the lord may take the infant (if he will) into  
his possession, in respect the infant may disagree to the marriage;  
and if the infant be deteyned from him, he shall recover him in a  
writ of ravishment of ward, and thereupon have the infant delivered  
to him. [d] But if the ancestor marrieth his heir apparant *infra*  
*annos nobiles*, and dieth, his heir being *infra annos nobiles*, and  
after age of consent the heir agreeth to the marriage, neither the  
king nor the lord shall have the marriage, for now it is a marriage  
*ab initio*, and there neede no other marriage.

## Sect. 106.

**E**N mesme le manner est, si le gar-  
dein luy marie, et la feme devie,  
estant l'enfant deins l'age de xiiii,  
ans ou xxi.

**I**N the same manner it is, if the  
gardian marry him, and the wife  
die, the infant being within the age  
of 14 yeares or 21.

**T**HIS *Littleton* addeth, because he spake in the case next before  
of a disagreement by the infant. Here he saith, that if the  
wife dye, the infant being within the age of consent.

## Sect. 107.

**E**T que tiel enfant poit disagreeer a tiel marriage, quant il vient al uge de xiiii. ans, il est prouue per les parolx del statute de Merton cap. 6. que issint dit.

De dominis qui maritaverint illos quos habent in custodi. sua, villanis, vel aliis, sicut burgensibus, ubi disparagentur, si talis hæres fuerit infra 14 annos, et talis ætatis quod matrimonio consentire non possit, tunc si parentes illi conquerantur, dominus amittat eustodiam illam usque ad ætatem hæredis, et omne commodum quod inde receptum fuerit, convertatur ad commodum hæredis infra ætatem existentis, secundum dispositionem parentum, propter dedecus ei impositum. Si autem fuerit 14 ans et ultra, quod consentire possit et tali matrimonio consenserit, nulla sequatur pœna.

Et issint est prove per mesme le statute, que nul disparagement est, mes lou celuy que est en garde est marie deins l'age de xiiii. ans.

**A**ND that such infant may disagree to such marriage, when he comes to the age of 14 yeares, it is proved by the words of the statute of Merton cap. 6. which saith thus :

And so it is proved by the same statute, that there is no disparagement, but where he which is in ward is married within the age of 14 yeares.

**"L**E statute de Merton." So called because the parliament was holden at Merton.

*"Et que tiel enfant poit disagreeer, &c. il est prove, &c."* Note, the time of disagreement is set downe by act of parliament, and so observed by Littleton, who seekes no other prooffe therein then by the law of England.

Merton, ca. 6.

*"Ubi disparagentur."* Disparagement, *disparagatio*, commeth of the verbe *disparago*, and that of *dispar* and *ago*.

Now it is necessarie to be understood, what disparagements there be for the which the heire may refuse.

And of such disparagements there be foure kindes.

The first, *propter vitium animi* ; as an ideot, *non compos mentis*, a lunatique, &c. (1)

The second, *propter vitium sanguinis* ; as, 1. a villein : 2. *burgensis* : 3. the sonne or daughter of a person attainted of treason or felony, albeit pardoned, for the blood is corrupted : 4. a bastard : 5. an alien or the childe of an alien. *Burgensis* is a man of trade,

[80. b.] as an haberdasher, a draper, or the like (and this agreeth with the civill law, *Patricii cum plebeijs matrimonia ne contrahant*), whereof Glanvill speaketh thus : *Si verò fuerit filius burgensis, astatem habere tunc intelligitur, quando discretè sciverit denarios numerare, et pannos ulnare, et alia paterna negotia similiter exercere.*

The third, *propter vitium corporis* ; as, first, *de membris*, having but one hand, one foot, one eye, &c. ; secondly, deformitie, as to looke asquint, a creeple, halt, lame, decrepit, crooked, &c. ; thirdly, privation, as blind, deafe, dumbe, &c. ; fourthly, disease horrible, as leprosie, palsie, dropsie, or such like diseases ; fiftly, great and continuall

Bracton, lib. 2. fol. 91.  
Britton, fo. 169.  
Fleta, lib. 1. cap. 12.  
Mirror, ca. 2. sect. 17.  
Rot. Parl.  
18 E. 1. fo. 9.  
The daughter of Nevil married to the sonne of Thos. of Weyland after his attainder.

(1) [See Note 47.]

continuall infirmities, as a consumption, and such like; sixthly, impotency to have children in respect either of age past children, or so tender yeares as there is too great disparitie, or for naturall disability or impediment, or such like; seventhly, deflowered of her virginity.

The fourth kinde of disparagement was *propter jacturam privilegii*, &c. as to marry the heire to a widow, whereby he should by reason of the bigamie have lost the benefit of his cleargie, whereby he might save his life; but now the exception of bigamie in that case is ousted by the statute (1). And *Littleton* saith, [d] that there be many other disparagements which are not specified in the said statute, for those two mentioned are put but for examples. In a word, it must be *competens maritagium absque disparagacione*.

1 E. 6. cap. 12.

[d] Vide Sect. 109.  
B. N. B. 140.

"*Si talis heres fuerit infra 14 annos, et talis etatis quod matrimonio consentire non possit, &c.*" Note, albeit the ward, where he is disparaged, may disagree at his age of fourteene yeares, yet the law doth so abhorre the odious dealing of the gardian, to whom the custody of the heire is committed, and his horrible profanation of honourable marriage, the only ligament of men's inheritances, as it inflicteth a great punishment upon the lord in this case, albeit the marriage be not perfect, but avoydable by disagreement.

"*Tunc si parentis illi conquerantur.*" *Littleton*, in the next Section expoundeth these words in this manner, viz. *Si parentes conquerantur, i. e. si parentes inter eos lamententur, quæ est tant a dire, que si les coens de tel infant ont cause de faire lamentation ou complaint pur le hont faire leur coen issini disparage, quel est in manner un hont a eux. Parens est nomen generale ad omne genus cognationis.* See more of this in the next Section.

"*Dominus amittat custodiam illam usque ad etatem heredis, et omne commodum quod inde receptum fuerit, convertatur ad commodum heredis, &c.* Here followeth the penaltie.

First, *amittat custodiam*, that is the whole benefit of the wardship. But in this case, if the gardian hath granted the wardship of the land to another *bonâ fide*, and after, the heire is disparaged, the grantee shall not forfeit his interest; for the statute is, *dominus amittat custodiam*.

Secondly, *et omne commodum quod inde receptum fuerit, convertatur ad commodum heredis secundum dispositionem parentum*. These words are expounded by *Littleton*, which needeth no further explanation. Now where readers upon this statute have put a case, that if the tenant hath issue a daughter, his wife *enascint* with a sonne and dieth, the lord doth disparage the daughter before the age of twelve yeares, the sonne is borne, the daughter disagrees, the sonne dieth the daughter within the age of fourteene, she shall be in ward againe: This case is not warranted by this statute, for this statute extends not to the heires female.

Vide the Second  
Part of the In-  
stitutes.  
Merton, cap. 5, 6.  
25 H. 6. 53.  
(3. Co. 127.)

If the tenant make a lease to *A.* for life, the remainder to *B.* in fee, the tenant for life surrenders upon condition, *B.* dieth his heire within age, the lord disparages the heire, tenant for life entreteth for the condition broken and dieth, the heire shall be out of ward, for that

(1) [See Note 48.]



that he claimeth as heire to one man. But if after the disparagement lands descend from another ancestor to the ward so disparaged, he shall be in ward for those lands.

If two joyntenants be of a ward, and the one disparageth the heire, both shall lose the wardship, for the words be, *et omne commodum, &c.*

“*Si autem fuerit 14 annorum et ultra, &c. nulla sequatur piana.*”

By which it appeareth (as *Littleton* observeth), that there is no disparagement but where the ward is married within the age of fourteene.

*Britton, fol. 169. acc.*

## Sect. 108.

**N**OTA, que il soloit estre question, coment ceux parolx serront entendes, Si parentes conquerantur, &c. Et il semble a ascuns, que considerant le statute de Magna Charta, que voit, quod hæredes maritentur absque disparagatione, &c. sur quel cel statute de Merton sur tiel point est foudue (1), que nul action poit estre pris sur cel statute, (2) entant que il ne fuit unques view ne oye, que ascun action fuil port sur cel statute de Merton pur cel disparagement envers le gardeine pur cest matter avantdit (3), &c. et si ascun action puisse estre prise sur tiel matter, il serra entendue ascun fois (4) estre mise en ure. Et nota, (5) que ceux parolx serront entendes (6), Si parentes conquerantur, id est, si parentes inter eos lamententur que (7) est taunt a dire, que si les cousins de tiel enfant ont cause de faire lamentation ou complaint enter eux, pur le hont fait a lour cousin issint disparage, quel est en maner un hont a eux, donques puit le prochain cousine, a que l'enheritage ne puit descendre, enter et ouster le gardeine en chivalrie. Et s'il ne voile, un auter cousin del enfant poit ceo faire, et les issues et profits prendre a use del enfant, et

**N**OTE, it hath beene a question, how these words shall be understood (*Si parentes conquerantur*). And it seemeth to some, who considering the statute of Magna Charta, which willeth, *quod hæredes maritentur absque disparagatione, &c.* upon which this statute of Merton upon this point is founded, that no action can be brought upon this statute, insomuch as it was never seene or heard, that any action was brought upon the statute of Merton for this disparagement against the gardian for the matter aforesaid, &c. and if any action might have beene brought for this matter, it shall be intended that at some time it would have beene put in use. And note that these words shall be understood thus, *Si parentes conquerantur, id est si parentes inter eos lamententur*, which is as much as to say, as if the cousins of such infant have cause to make lamentation or complaint amongst themselves, for the shame done to their cousin so disparaged, which in manner is a shame to them, then may the next cousin, to whom the inheritance cannot descend, enter and ouste the gardain in chivalrie, And

(1) que nul action poit estre pris sur cel statute, not in L. and M.

(2) come semble et, L. and M.

(3) per cest matter avant dit, not in L. and M.

(4) per comen presumption devant ceux

heures instead of *entendue ascun fois*, in L. and M.

(5) Et nota not in L. and M.

(6) en tiel maner in L. and M.

(7) os instead of *que* in L. and M.

*et de ceo render accompt al enfant quant il vient a son plein age. Ou aulement l'enfant deins age poit enter luy mesme, et ouster le gardein, &c. Sed quære de hoc.*

And if he will not, another cousin of the infant may doe this, and take the issues and profits to the use of the infant, and of this to render an account to the infant when he comes to his full age. Or otherwise the infant within age may enter himself, and ouste the gardein, &c. *Sed quære de hoc.*

9 H. 2.  
(3. Inst. 1.)

Vide 2. Co. the  
Prinse's case.

“ *LE statute de Magna Charta.*”

Though it be in forme of a charter, yet being granted by assent and authoritie of parliament *Littleton* here saith it [81. a.] is a statute.

This parliamentarie charter hath divers appellations in law. Here it is called *Magna Charta*, not for the length or largenesse of it, (for it is but short in respect of the charters granted of private things to private persons now a dayes being (*elephantina charta*,) but it is called the great charter in respect of the great weightnesse and weightie greatnesse of the matter contained in it in few words, being the fountaine of all the fundamentall lawes of the realme; and therefore it may truly be said of it, that it is *magnum in parvo*. It is in our bookes called *Charta Libertatum, et Communis Libertas Angliæ*, or *Libertates Angliæ*, *Charta de Libertatibus*, *Magna Charta*, &c. And well may the lawes of England be called *Libertates, quia Liberos faciunt*. *Magna fuit quondam Magna revertentia Charta.*

Bracton, 414.  
and 301.  
Fleta, lib. 2.  
cap. 48. & lib. 2.  
cap. 2.  
Mirror, cap. 2.  
sect. 19.  
Brit. fol. 177. b.

This statute of *Magna Charta* is but a confirmation or restitution of the common law, as in the statute called *Confirmatio Chartarum anno 25 E. 1.* it appeareth by the opinion of all the justices; and in *5 H. 3. tit. Mord. 53.* *Magna Charta* is there vouched; for there it appeareth that king *John* had granted the like charter of renovation of the ancient lawes.

This statute of *Magna Charta* hath beene confirmed above thirty times, and commanded to be put in execution. By the statute of *25 E. 1. cap. 2.* judgements given against any points of the charters of *Magna Charta*, or *Charta de Foresta*, are adjudged void. And by the statute of *42 E. 3. c. 1.* if any statute be made against either of these charters it shall be void.

“ *Sur le statute de Magna Charta le statute de Merton est fondee sur tiel point, viz. Quod hæredes maritentur absque disparagatione (1).*” [81. b.]

“ *Foundue.*” So as *Magna Charta* is the foundation of other acts of parliament. This act extendeth as well to females as to males.

“ *Nul action poit estre prise sur cel statute, entant que il ne unques fuit view ou oye, &c. Et si aucun action fuisset estre prise sur cest matter, il serra intend a aucun foits estre mise en ure.*”

Hereby

(1) See 9 Hen. 3. c. 6.

25 E. 1.

5 H. 3. Mord. 53.  
Matth. Paris,  
246. 276. 248.

25 E. 1. ca. 2.

42 E. 3. ca. 1.

Hereby it appeareth how safe it is to be guided by judicial presidents, the rule being good, *Periculosum existimō, quod bonorum virorum non comprobatur exemplo*. And as usage is a good interpreter of lawes, so non usage where there is no example is a great intendment that the law will not beare it; for, saith *Littleton*, if any action might have beene grounded upon such matter, it shall be intended, that sometime it should have been put *in ure* (2). Not that an act of parliament by non user can be antiquated or lose his force, but that it may be expounded or declared how the act is to be understood.

Vide Petitiones coram domino rege in parlamento, fol. 3.  
18 E. 1.  
39 H. 6. 39.  
per Ashton.  
6 Eliz. Dier. 289.  
(Ante 11 a.)  
23 Eliz. Dier.  
Nullum breve de errore de iudicio in 5. port. quia nullum breve repetitur.  
3 E. 3. 50.  
11 H. 4. 7. and 38.

Vide le statute de Marlebridge, cap. 27. In custodia parentum.

“*Si parentes conquerantur.*” Of this sufficient hath beene said before.

“*Si les cousins.*” Here *Littleton* expoundeth parents to be his cousins, under which name of cousins *Littleton* includeth uncles and other cousins, who when the father is dead are *in loco parentum*.

“*Ont cause a faire lamentation, &c.*” Note, if they have cause to make lamentation, it sufficeth, though they never complaine.

“*Pur le hont fait a leur cousin.*” For when their cousin is disparaged in his marriage, it is not only a shame and infamie to the heire, but in him, to all his bloud and kindred.

“*Donques, foit le procheine cousin, a que le enheritance ne foit discender, enter et ouster le gardein in chivalrie.*”

This is worthy the observation, for the words of the statute are generall, *secundum dispositionem parentum*, and the construction thereof shall be according to the reason, of the common law; for the next cousin, to whom the inheritance cannot descend, shall enter and ouste the gardian, and shall be in place of a gardian, as it is in case of a gardian in socage.

“*Et s'il ne voile, un autre cousin del enfant foit ceo faire.*” Still pursuing the reason of the common law in case of gardian in socage.

“*Et les issues et profits prender al use del enfant, &c.*” This is so evident as it needeth no explication.

“*Ou autrement l'enfant deins age foit enter luy mesme et ouste le gardein.*” If none of the cousins aforesaid will enter, then the heire himself may enter; in all which the reason of the common law is pursued. But what if the heire be disparaged, and the next of kin doth enter, and when the heire commeth to 14 he agreeth to the marriage; yet shall not this give any advantage to the lord, for that he had lost the wardship before.

(2) [See Note 49.]

## Sect. 109.

[82. a.]

**I**TEM, mults auters divers disparagements y sont, que ne sont specifies en mesme le statute. Come si le heire que est en gard est marry a un que n'ad forsque un pee, ou forsque un maine, ou que est deforme, decrepite, ou ayant horrible disease, ou graund et continual infirmitie; et (si soit heire male) si soit marry a feme que est passe l'age d'enfanter. Et mults auters causes de disparagements sont; sed de illis quære, car il est bon matter d'apprender.

**A**LSO, there be many and divers other disparagements <sup>(Ante 80. a.)</sup> which are not specified in the same statute. As if the heire which is in ward be married to one which hath but one foot, or but one hand, or which is deformed, decrepit, or having some horrible disease, or great and continuall infirmitie; and (if he be an heire male) if he be married to a woman past the age of childe-bearing. And there be other causes of disparagement; but inquire of them, for it is a good matter to understand.

Of this sufficient hath been said before.

## Sect. 110.

**E**T des heires males que sont deins l'age de 21 ans apres le mort leur ancestor nient marries, en tiel cas le seignior avera le mariage de tiel heire, et avera temps et space de tender à luy convenable mariage sans disparagement deins meme le temps de 21 ans. Et est ascavoir, que l'heire en tiel case poit estier s'il voit estre marry ou non; mes si le seignior, que est appel gardein en chivalry a tiel heire, tender convenable mariage deins l'age de 21 ans sans disparagement, et l'heire ceo refuse, et ne soy marie deyns le dit age, donques le gardeine avera le value del mariage del tiel heire male. Mes si tiel heire luy meme marie deins l'age de 21 ans encounter la volunt le gardeine en chivalrie, donques le gardein avera le double value del mariage per force de le statute de Merton avantdit, come en meme le statute est comprise pluis a pleine.

**A**ND of heires males which be within the age of 21 yeares after the decease of their ancestor and not married, in this case the lord shall have the marriage of such heire, and he shall have time and space to tender to him covenable mariagewithout disparagement within the said time of 21 yeares. And it is to be understood, that the heire in this case may chuse whether he will be married or no; but if the lord, which is called guardian in chivalry, tenders to such heire covenable marriage within the age of 21 yeares without disparagement, and the heire refuseth this, and doth not marrie himselfe within the said age, then the gardein shall have the value of the marriage of such heire male. But if such heire marrieth himself within the age of 21 yeares against the will of the gardein in chivalrie, then the gardein shall have the

double value of the marriage by force of the statute of *Merton* aforesaid, as in the same statute is more fully at large comprised.

**"D**E tender a luy convenable marriage, &c." But it is in the election of the lord, whether for the single value the lord will tender a marriage or no, for he shall have the single value without any tender (1).

And of this there needeth no other explication. The value of the marriage of such an heire is according to the valuation by lawfull triall, or as much as another had before offered to give for the same without fraud and covyn.

**"Le heire en tiel case poit estier s'il voit estre marrie, ou non, &c."** And so on the other side, though there be a tender made of a convenient marriage without disparagement, yet the heire may refuse,

[82. b.] for in everle mariage there must be a free consent.

**"Si tiel heire."** That is, if such an heire to whom a tender hath been made by the lord, and by whom a refusall hath been made; if such an heire afterwards marieth another within age, he shall forfeit double the value; but if he before any tender marieth himselfe within age, he shall pay but the single value of the marriage.

Neither the single value nor the double value shall be recovered against the heire but after his full age; but for both these the lord hath a double remedie, viz. an action, as is aforesaid; or the lord may retaine the land after full age for his satisfaction of both, with this difference, that in the case of the single value the taking of the profits shall not be accounted parcell of the value, but as a gage or pledge till the heire do satisfy him of the single value; but in case of the double value, the perception of the profits shall be taken in satisfaction of the double value; for the statute of *Merton*, which giveth the forfeiture, saith, *Dominus teneat terram, &c. per tantum tempus quod inde percipere possit duplicem valorem maritagii*: which words (*quod inde, &c.*) prove that the taking of the profits shall go in satisfaction: but in case of the single value, untill the heire doth satisfie the lord of the same.

No forfeiture of marriage is given, by the said statute of *Merton*, of an heire female, as appeareth by the said act; neither at the common law could the lord have holden the land of the heire female after fourteene years for the value.

6 Co. 70. Lo.  
Darcie's case.  
Vid. Britton,  
fol. 169.  
(6 Co. 137.)

Merton, cap. 6.  
18 E. 3. 18,

Stat. de Merton,  
cap. 6. 3 E. 2.  
acc. sur l'estat.  
43. 3 E. 2.  
ibid. 37.  
16 E. 3.  
ibid. 14.  
18 E. 3. 18.  
Temps E. 1.  
acc. sur l'estat.  
43 E. 3. 21.  
27 H. 3. 4.  
Statute de Merton,  
cap. 7.  
35 H. 6. tit.  
Gard. 71.  
6 Co. 71. Lord.  
Darcie's case.

## Sect. 111. .

**I**TEM, divers tenants teignent de leur seigniors per service de chivaler, et uncore ils ne teignent per escuage, ne paieront escuage; come ceux que teignent de leur seigniors per castile-garde, c'est-ascavoir, a garder un tower del castle leur seignior,

**A**LSO, divers tenants hold of their lords by knights service, and yet they hold not by escuage, neither shall they pay escuage; as they which hold of their lords by castle-ward, that is to say, to ward a tower of the castle of their lord, or

(1) This point, which before lord Coke's time appears to have been doubtful, was adjudged in the case of Palmer and Wilder,

and again in lord Darcie's case. See the former case in 5. Co. 126. b. and the latter in 6. Co. 70. b.

*seignior, ou un huis ou un auter lieu del castle, per reasonable garnishment, quant lour seigniors oyont, que enemies voylent venter, ou sont venues en Engleterre. Et en plusors auters cases home poit tener per service de chivaler, et uncore il ne tient per escuage, ne payera escuage, sicome serra dit en le tenure per graund serjeantie. Mes en tous casés ou home tient per service de chivaler, tiel service trait all seignior gard et mariage.*

or a doore or some other place of the castle, upon reasonable warning, when their lords heare that the enemies will come, or are come in England. And in many other cases a man may hold by knight's service, and yet he holdeth not by escuage, nor shall pay escuage, as shall be said in the tenure by grand serjeantie. But in all cases where a man holds by knight's service, this service draweth to the lord ward and mariage.

4 Co. 88. in  
Luttrell's case.  
6 Co. 20. a.  
Gregorie's case.  
29 H. 2.  
Gard. 198.

**"P**ER castel-gard, wardum castri, seu castel-gardum, seu castel-trigardum." He that holdeth by castle-gard, holdeth by knight's service, but not by escuage; for escuage is due when the king maketh a voyage royall out of the realme (as hath beene said) and the tenant maketh default; but castle-gard is to be done within the realme, and without any voyage royall.

Also a certaine tearme is appointed for the service of the tenant that holdeth by escuage, but no certaine tearme by law for him that holdeth by castle-gard. *Vide* in the title of Grand Serjeantie, Sect. Hereof come *castellani*, or *constabularii castri*, for

[83. a.]

*Vide* Mag.  
Chart. cap. 19.  
20 W. 1. cap. 7.  
Bract. lib. 3. fol.  
363.  
Fleta, lib. 2. cap.  
43.

Magna Chart.  
cap. 20.

*"A garder un tower del castle, &c."* A tower, or a doore, or a bridge, or a sconce, or some other certaine part of the castle; for the tenure must be certaine. And this may be done by the tenant himselfe or his deputie.

*"Del seignior."* For it cannot be of a castle of another.

Lord and tenant by castle-gard, the lord granteth over his seignior to another, [a] the castle-gard is gone, because the grantee hath not the castle. [b] For the same reason it is, that if one holdeth of me, as of my manor of *D.* by fealtie and suit of court, if I grant over the services of this tenant, the suit is gone, because the grantee hath not the manor. [c] But if the castle be wholly ruined, *si castrum sit penitus dirutum*, yet the tenure remaineth by knight's service, and it goeth in benefit of the tenant, as to the garding of the castle, untill it be reedified. But ward and marriage belongeth to the lord in the meane time. For *Littleton* in the end of this Section putteth it for a generall rule in all cases where a man holdeth by knight's service, it draweth ward and marriage.

If the tenant make default in garding of the castle, the lord may distreine for it, and recover satisfaction in dammages.

*"Per reasonable garnishment."* This warning must be given by the lord or some other for him, and the tenant need not to stirre until he have such warning.

*"Enemies."* Which is to be understood of any manner of enemies whatsoever. And though *Littleton* speakes of enemies, yet it seemeth that to keep a castle in time of insurrection and rebellion (albeit in proprietic of speech rebels are no enemies) is a tenure by knight's service. *Vide* Hill 8 E. 1. Midd. Rott. 86.

*"Voylent"*

(3 Ro. Abr. 513.)

[a] Tempe E. 2.  
tit. Ass. 390.  
31 E. 1. tit.  
Ass. 441.  
[b] 17 E. 3. 65. 78.  
4 E. 3. 62.  
[c] 4 Co. 88.  
Luttrell's case.  
3 H. 2.  
Bandlee's and  
Capel's case.  
4 E. 3. 55.

"*Voylent vener.*" For preparation is to be made upon warning before the enemy be come indeed into *England*. This appeareth to be in time of hostility and warre, or for preparation therefore. But a tenure to keepe a castle in time of peace only is no knight's service.

If the tenant by castle-gard doe serve the king in his warre, he shall be discharged against the lord, according to the quantitie of the time that he was in the king's host.

(2. Ro. Abr. 205.)

*Fleta* speaketh of an old word called *wardwite*, and (saith he) *significat quiescentiam misericordie, in casu quo non invenerit quis hominem ad wardam faciendam in castro.*

*Fleta*, lib. 1. cap. 42.

## Sect. 112.

**E**T si un tenant, que tient de son seignior per service de entier fee de chivaler, morust, son heire donques esteant de plein age, scil. de 21 ans, donque le seignior avera 100s. pur reliefe, et del heire celuy que tient per le moitie d'un fee de chivaler, 50s. et de celuy que tient per le quart part de fee d'un chivaler, 25s. et sic que plus, plus, et que meins, meins.

**A**ND if a tenant which holdeth of his lord by the service of a whole knight's fee, dieth, his heire then being of full age, scil. of 21 yeares, then the lord shall have 100s. for a reliefe, and of the heire of him which holds by the moitie of a knight's fee, 50s. and of him which holds by the fourth part of a knight's fee 25s. and so he which holds more, more, and which lesse, lesse.

"**R**ELIEFE, *relevium*." This word is derived from the original before (1).

*Nota*, Reliefe [a] is no service, but an improvement of the service, or an incident to the service (2), for the which the lord may distreine (3), but cannot have an action of debt (4), but his

[83. b.] executors or administrators may have an action of debt, and cannot distraine (1).

And it [b] is to be understood, that *feodum militis*, a knight's fee, consisteth of twentie pound land (2), and he payeth for his reliefe for a whole knight's fee the fourth part of his fee, viz. five pound, and so according to the rate.

*Baronia*, a baronie, or a baron's fee, consisteth of thirteen knights fees and the third part of a knight's fee (3), which amounteth to foure hundred markes *per annum*; and the baron for an entire baronie payeth for his reliefe an hundred markes, which is the fourth part of the value of his baronie.

*Comitatus*,

(1) [See Note 50.]

(2) [See Note 51.]

(3) [See Note 52.]

(4) Acc. ante 47. b. But there are some opinions to the contrary. See 2. Leon. 179. 2. Ro. Rep. 371.

[83. b.]

(1) S. p. acc. ante 47. b. post. 162. b. and 1. Show. 36.

(2) See ante 69. a. and note 3. there.

(3) As to this notion of there being a certain number of knights fees in a barony and earldom, see ante 69. a. note 5.

Vide Sect. 103.

[a] Temps E. 1. Reliefe 13. 41 E. 3. 22. 4 E. 2. Avowrie 210. 7 H. 6. 13. 23 H. 8. Rot. 528. 34 E. 1. Avowrie 233. (3. Co. 66. Ante 47. b.) [b] Stat. del 1 E. 2. de militibus. Vide 9. Co. 134. Anth. Lowe's case. (2. Inst. 496. Ante 69. b.)

*Comitatus*, an earldome, or an earle's fee, consisteth of a baronie, and the third part of a baronie, which includeth twenty knights fees, amounting to foure hundred pound land *per annum*, and he payeth for his reliefe for an entire earldome the fourth part of his revenue, and that is an hundred pound. All which appeareth by the statute of *Magna Charta*, cap. 2. made in the ninth yeare of *Henrie* the third, at which time there was neither duke, marquesse, nor viscount in *England*, as before is said. But there be precedents in the exchequer, that a dukedome consisting of two earldomes, viz. eight hundred pound land by the yeare, payeth two hundred pound, and a marquesse consisting of two baronies, viz. eight hundred markes land *per annum*, and of an earldome and a halfe, payeth two hundred markes for his reliefe. What the viscount should pay in certaine I have not heard. Before the making of the statute of *Magna Charta* the king had *rationabile relevium* of noblemen, and it was not reduced to any certaintie (4), yet ought it to have been reasonable and not excessive.

I have seene the record of a charter made in 20 *H. 6.* to *Henrie Beauchampe* earle of *Warwicke*, whereby he was created king of the Ile of *Wight*, to him and the heires males of his bodie. His reliefe was uncertaine, and not limited by the statute of *Magna Charta*.

It is to be observed, that the words of the statute of *Magna Charta* be, *heres comitis de comitatu integro, et heres, baroniâ integrâ, &c.* Now what an entire earldome entire baronie is, hath beene declared before.

It is also to be observed, that at and before the statute of *Magna Charta* all earldomes and baronies were derived from the crowne, and were holden of the king *in capite*, and the king would not suffer them to be divided, or severed. And such entire earldomes and entire baronies are within the statute, but at this day earles and barons are without such earldomes and baronies of the king's gift in chiefe. For at the creation of an earle, he hath sometimes an annuities granted unto him (5), and sometimes nothing; so as such earles and barons so created are cleerely out of the statute of *Magna Charta*, and are to pay such reliefes as other men that hold of the king *in capite*. For as the heire of a knight shall not pay reliefe, unlesse he hath a knight's fee, &c. so neither the earle nor baron shall pay any reliefe by this statute, unlesse he hath an earldome, &c. or baronie, &c.

"*Son heire de plene age, scil. de 21 ans.*" And yet in some case the heire shall pay reliefe when he was within age at the time of the death of his ancestor. As if a man holdeth lands of the king by knight's service *in capite* and of a common person other lands by knight's service, and dieth his heire being within age, the king hath all in ward by his prerogative untill the full age of the heire. In this case the heire shall pay reliefe to the other lord, for that the king had the wardship of bodie and lands. And the lord upon everie descent ought to have either wardship or reliefe.

But

(4) See 2. Inst. 7, 8. and Wright's Ten. 99. (5) [See Note 53.]

(2. Ro. Ab. 616.)

Glanvil. lib. 9.  
cap. 4. 6. Bracton,  
lib. 2. fol. 83. Brit-  
ton, fol. 178.  
Ockam, 42. F.N.B.  
92. 286. Fleta, lib.  
3. cap. 17.  
*Magna Charta*,  
cap. 2.

Vide Bracton, fol.  
84. 14 H. 4. in re-  
cordo longo. 10 H.  
7. 19. 20 E. 3. Am.  
123. tit. Avowrie  
126. 18. Am. pl.  
ultimo. 23 E. 3. 2.

16 E. 3. Exchange  
2. 46 E. 3.  
Forfeiture 18.

24 E. 3. 24.  
26 H. 8.  
32 H. 8. ca. 2.  
in fine.



But if there be lord and tenant by knights service, and the tenant dieth his heire being within age, the lord wayveth his wardship, as he may, and taketh himselfe to his seignorie; in this case the lord shall not have reliefe at his full age, because he might have had the wardship of the bodie and land. Lord and tenant of two manors by divers tenures by knights service, the tenant is disseised of the one, and the disseisor dieth seised, and the tenant dieth seised of the other, his heire within age, the lord seised the body and lands of that manor, and after the heire at his full age recovereth the other manor against the heire of the disseisor, he shall pay reliefe for that manor, and so one lord of the heire of one tenant shall have both wardship during his minoritie and reliefe at his full age.

1 E. 3. 6.  
Pl. Com. 239.  
33 E. 3. tit.  
Gard. Statham.

[84. a.] "Son heire." [k] And yet the successor of a bishop or abbott may pay reliefe by prescription or grant.

[k] 3 E. 5. 13.  
76. 8 R. 2.  
Reliefe 14.  
3 H. 4. 2.  
2 H. 3.  
Avowrie 124.

If the tenant infeoffeth his heire apparent by collusion, and dieth [7] his heire of full age, it is a question in our bookes, whether he shall have reliefe either by the common law, or by the statute of *Marlebridge*, ca. 6. But now the statute [m] of 13 *Eliz.* ca. 5. hath cleered that question, and that the lord shall have reliefe where the conveyance is made to any person by collusion, &c.

[7] 39 E. 3.  
tit. Reliefe.  
24 E. 3.  
Reliefe 11.  
Bracton, lib. 2. 25.  
[m] 13 *Eliz.* cap. 5.

## Sect. 113.

**I**TEM, *home puit tenere son terre de son seignior per le service de deux fees de chivaler; et donque Theire, esteant de pleine age al temps de mort son auncester, paiera a son seignior x. l. pur reliefe.*

**A**LSO, a man may hold his land, of his lord by the service of two knights fees; and then the heire, being of full age at the time of the death of his ancestor, shall pay to his lord x. pound for reliefe (1).

This is evident, and needeth no explanation.

## Sect. 114.

**N**OTA, *si soit aiel pier et fils, et la mere morust vivant le pier de le fils, et puis l'aiel, que ti nt la terre per service de chivaler, morust seisie, et sa terre descendist al fils la mere come heire al aiel, que est deins age; en cest cas le seignior avera le garde de la terre, mes nemy le garde del corps del heire, pur ceo que nul serra en garde de son corps a ascun seignior vivant*

**N**OTE, if there be grandfather father and sonne, and the mother dieth living the father of the sonne, and after the grandfather, which holds his lands by knight's service, dieth seised, and his land descend to the sonne of the mother as heire to the grandfather, who is within age; in this case the lord shall have the wardship of the land, but

(1) See further as to reliefs, post. 85. a. at the end of the note there, 90. b. 91. a. and b. 92. a. 93. a. 106. a. Wright's

Ten. 97. and Vin. Abr. *Tenures*. E. a. to O. a.

*vivant son pier, pur ceo que le pier durant son vie avera le mariage de son heire apparant, et nemy le seignior. Auterment est, ou le pier est mort vivant la mere, lou le terre tenus en chivalrie discendist al fils de part son pier, &c.*

but not of the bodie of the heire, because none shall be in ward of his bodie to any lord living his father, for the father during his life shall have the marriage of his heire apparent, and not the lord (2). Otherwise it is, where the father dieth living the mother, where the land holden in chivalrie descends to the son on the part of the father, &c.

Fleta, lib. 1.  
cap. 2. 16 E. 3.  
Dischin 6.  
31 E. 1.  
Gard. 154.  
8 E. 2. Tresp. 235.  
F. N. B. 243.  
Ambrosia Gorge's  
case.  
6. Co. 22.

"**FITZ.**" Yet the father shall have the marriage of his daughter if she be his heire apparent; and *Littleton's* reason extendeth to the daughter, for that (saith he) the father shall have the wardship of his heire apparent, within which words the daughter is included, so long as she continueth heire apparent.

"*Le seignior avera le garde del terre.*" Note, that albeit in this case the law doth give the custodie of the body to the father, and barreth the lord thereof, yet the lord shall have the wardship of the land by force of the tenure at the first creation thereof. And so it is if the father marieth his heire within age and dieth, yet the lord shall have the wardship of the land.

"*Vivant son pier.*" This doth not extend to any collaterall heire, but only to the sonne or daughter being heire apparent; for albeit a man shall have an action of trespass, *quare consanguineum et heredem capit*, and albeit the words be *cujus maritagium ad ipsum pertinet*, because the well bestowing of his heire apparent in marriage is a great establishment of his house, yet that is to be understood as against a wrong doer, but not against a gardian in chivalrie, and the mother shall have the like writ for taking away of her sonne and heire apparent. And yet the mother shall not barre the lord by knight's service of his wardship of the bodie, as *Littleton* here saith, *\*quitamen ex filiâ tuâ nascitur in potestate tuâ non est, sed patris ejus.* [84. b.]

"*A ascun seignior.*" Put the case there is lord, *et feme* tenant by knight's service of a carve of land, the *feme* maketh a feoffment in fee upon condition, and taketh the lord to husband, and hath issue a sonne, the wife dyeth, the issue entreth for the condition broken, the lord entreth into the land as gardeine by knight's service, and maketh his executors, and dieth; in this case, the executors shall have the wardship of the land during the minority of the heire, but not the wardship of the body: for albeit the lord seemeth to have a double interest in the wardship of the bodie, one as lord, and another as father, yet as father, and not as lord, in judgement of law, he shall have the wardship of the bodie of his son and heire apparent, in respect of nature, which was before any wardship in respect of seignories by knight's service began, and that wardship by reason of nature cannot be waived, and claime made in respect of the seignorie. And

9 E. 2.  
18 E. 3. 25.  
29. Ass. 35.  
26 E. 3. 37.  
31 E. 3.  
Bar. 337.  
33 E. 3.  
Gard. 32.  
30 E. 3. 17.  
31 H. 6. 55.  
13 H. 4. 16.  
F. N. B. 143.  
31 E. 3. Br. 357.  
9 E. 4. 53.  
\* Vide Flet.  
lib. 1. cap. 6.  
See W. 2. c. 35.  
(3. Ro. Abr. 39.)

And the executors of the father shall not have such a wardship which the testator had as father, neither can such a wardship be forfeited by outlawrie, because it is due to the father in respect of privitie of nature.

*"De son heire apparent."* And therefore if the father be attainted of felonie, &c. then cannot the sonne or daughter be an heire apparent, because the blood is corrupted betweene them, and consequently in the life of the father his sonne in that case shall be in ward.

A woman seised of lands in fee holden by knight's service taketh husband an alien, and hath issue, and the wife dieth, the issue shall be in ward, and the father shall not have the custodie of him, for that in the eye of the law he is not his heire apparent, as *Littleton* here speaketh.

(8 Co. 39. a.  
Post. 88. b.)  
33 H. 6. 58.  
7 Co. 13. in  
Calvin's case.  
Vide Plot. lib. 1.  
c. 12. §. Cum  
Patr. de feodo. &c.  
(Ante 8. a.  
2 Ro. Abr. 39.)

## Sect. 115.

**NOTA**, si home soit seisie de terre que est tenus per service de chevalier, et fait feoffment en fee a son use, et morust seisie del use, son heire deins age, et nul volunt per luy declarer, le seignior avera brieve de droit de gard de corps et del terre, sicome tenant ust devie seisie del demesne. Et si te heire soit de pleine age al temps del morant son ancestor, en tiel case il payera reliefe, sicome il fuissoit seisie del demesne. Et c'est per le statute de anno 4 H. 7. cap. 17.

**NOTE**, if a man be seised of land which is holden by knight's service, and maketh a feoffment in fee to his own use, and dieth seised of the use, his heire within age, and no will declared by him, the lord shall have a writ of right of the wardship of the bodie and land, as if the tenant had died seised of the demesne. And if the heire bee of full age at the time of the decease of his ancestor, in this case he shall pay reliefe, as if he had been seised of the demesne. And this is by the statute of 4 H. 7. cap. 17.

This Section is in addition to *Littleton* (1), and therefore I passe it over; and the rather, for that the said statute of 4 H. 7. is become of no force, for that by the statute of 27 H. 8. cap. 10. all uses are transferred into possession.

[85. a.]

## Sect. 116.

**NOTA**, il y ad gardein en droit en chivalrie, et gardein en fait en chivalrie. Gardein en droit en chivalrie est, lou le seignior per cause de son seigniorie est seisie de gard de terres et del heyre, ut supra. Gardien en fuyt en chivalrie est, lou en tiel case

**NOTE**, there is gardian in right in chivalrie, and gardian in deede in chivalrie. Gardian in right in chivalrie is, where the lord by reason of his seigniorie is seised of the wardshippe of the lands and of the heyre, ut supra. Gardian in deede

(1) It was first introduced in Red.

*case le seignour apres son seisin graunt, per fayt ou sauns fayt, le gurd des terres, ou del heire, ou d'ambideux, a un autre per force de quel grant legrauntee est en possession. Donque est le grauntee appel gardein en fait.*

deede in chivalrie is, where in such case the lord after his seisin grants, by deede or without deede, the wardship of the lands, or of the heire, or of both, to another, by force of which grant the grauntee is in possession. Then is the grauntee called *gardian in fait*, or *gardian in deed*.

**H**ERE *Littleton* divideth *gardein* in chivalrie into *gardian in right*, and *gardian in fait*. And this is evident, and needeth no explanation.

(3 Ro. Abr. 62.)

“*Per fait ou sans fait.*” Here *Littleton* affirmeth, that the wardship of the body may be granted over without deed; and herein note a diversity between an original chattell of a thing that properly lyeth in grant, and a chattell derived out of a freehold of any thing that lyeth in grant. As for example, if a man make a lease for years of a villeine, this cannot be done without deed, neither can the lessee assigne it over without deed, because it is derived out of a freehold that lyeth in grant. But the wardship of the body is an original chattell during the minority derived out of no freehold; and therefore as the law createth it without deed, so it may be assigned over without deed.

A corporation aggregate of many cannot make a lease for yeares without deed, in respect of the quality of the incorporation; but their lessee may assigne it over without deed.

If an advowson be holden by knight's service, and the tenant dieth his heire being within age, the lord cannot grant the wardship of the advowson without deed; because it is derived out of an inheritance that lyeth in grant, and passeth not by livery; for *jus presentandi est incorporale*, and so (albeit there be diversity of opinion in our bookes) is the law taken at this day (1).

(1) [See Note 55.]

12 E. 3. tit. Grant 59.  
7 E. 3. 63.  
26 E. 3. 65.  
28 E. 3. 96.  
14 E. 3. Act. sur le stat. 17.  
25 E. 3. 40.  
31 E. 3. Vouch. 5.  
45 E. 3. 25.  
20 M. 4. 16.  
12 H. 4. 19.  
5 H. 7. 17. 36.  
23 El. Dyer 371.  
35 H. 8. Br. tit. Grant 64.  
36 H. 8. tit. Grant. B. 154.  
23 H. 6. 34.  
19 H. 6. 33.  
(Post. 325. b.)

24 E. 3. 69. 70.  
5 E. 3. 58.  
43 E. 3. 15.  
5 H. 7. 36.  
14 H. 7. 16.  
15 H. 8. 8.  
Bract. 360, 368.  
246 43 E. 1. 6.  
5 H. 7. 37.  
11 H. 6. 4.  
6 H. 7. 3.  
10 H. 8. 16. El. Dyer 323.

## [85. b.] CHAP. 5.

## Of Socage.

## Sect. 117.

**T***ENURE en socage est, lou le tenant tient de son seignior son tenement per certeine service per tous maners de services, issint que les services ne sont pas services de chivaler. Sicome lou home tient son terre de son seignior per feallie et per certeine rent, pur tous maners de services; ou lou home tient per homage et feallie et certeine rent, pur tous maners de services; ou lou il tient per homage et fealty pur tous maners de services; car homage per soy ne fait pas service de chivaler.*

**T***ENURE in socage is, where the tenant holdeth of his lord the tenancie by certeine service for all manner of services, so that the service be not knights service. As where a man holdeth his land of his lord by fealty and certaine rent, for all manner of services; or else where a man holdeth his land by homage, fealty, and certaine rent, for all manner of services; or where a man holdeth his land by homage and fealty for all manner of services; for homage by itselfe maketh not knights service.*

**“TENURE in socage (1).”**

Agriculture or tillage is of great account in law, as being very profitable for the common wealth, wherein the goodnesse of the habit is best knowne by the privation; for by laying of lands used in tilth to pasture, six maine inconveniences do dally encroase. First, idleness, which is the ground and beginning of all mischiefs. 2. Depopulation, and decay of townes; for where in some townes 200 persons were occupied, and lived by their lawful labors, by converting of tillage into pasture, there have beene maintained but two or three heardsmen; and where men have been accounted sheepe of God's pasture, now become sheep men of these pastures. 3. Husbandry, which is one of the greatest commodities of the realme, is decayed. 4. Churches are destroyed, and the service of God neglected by diminution of church livings (as by decay of tythes, &c.) 5. Injury and wrong is done to patrons and God's ministers. And 6. The defence of the land against forraine enemies is enfeebled and impaired, the bodies of husbandmen being more strong and able, and patient of cold, heat, and hunger, than of any other.

The two consequents that follow of these inconveniences are, first, the displeasure of Almighty God; and, secondly, the subversion of the polity and good government of the realm; and all this appeareth in our bookes. And the common law {a} giveth arrable land (which anciently is called *hyde and gaine*) the preheminency and precedence before meadowes, pastures, woods, mynes, and all other grounds whatsoever; and [\*] *averia caruca*, the beasts of the plough, have in some cases more priviledge than other cattell have. And amongst the *Romans* agriculture or tillage was of high estimation, insomuch as the senators themselves would put their hand to the plough; and it is said, that never prospered tillage better, than when the senators themselves plowed (such force hath the example of superiors) whereof three famous *Romans* in their several kindes spake.

Mirror, ca. 1. s. 3.  
4 H. 7. ca. 10.  
4 Co. Tiringham's case.  
fo. 39. and  
4 H. 7. ca. 12.

[a] 20 E. 3.  
Admesurement 2.  
14. Ass. 21.  
24 E. 3. 25.

[\*] Mirror.  
Bracton, fo. 217.  
Fleta, lib. 2. ca. 41.  
Regist. Orig. 97.  
Ockam, 38, 39.  
4 E. 3. 1. a.  
18 F. 2. tit.  
Action sur le stat.  
45. Temps E. 1.  
Avoury 230.  
29 E. 3. 16, 17.

*Omnium*

(1) See Wright's Ten. 142. and 2. Blackst. Comment. 5th ed. 79.

Cic. lib. 1. Offic.

*Omnium rerum, ex quibus aliquid exquiritur, nihil agriculturæ melius; nihil uberius, nihil dulcius, nihil libero homine dignius.*

Virgil. lib. 2.  
Georg.

*O fortunatos nimium, sua ei bona norint,  
Agricolæ! quibus ipsa, procul discordibus armis,  
Fundit humo facilem victum justissima tellus.*

Seneca in Epist.

*Nullum laborem recusant manus, quæ ab aratro ad arma transferuntur, &c. fortior autem miles ex confragoso venit; ead ille unctus et nitidus in primo pulvere deficit.* But now let us peruse our author's words.

"Socagium." Littleton in this Chapter, Section 119. fetcheth this word from the originall. *Socagium idem est quod servitium socæ, et soca idem est quod caruca, s. un soke ou un caruc.* (1)

Bracton, lib. 2.  
fol. 77.

[a] Glanvil. lib. 7. cap. 9. & 11. & lib. 9. ca. 4. Fleta, lib. 1. ca. 2. & lib. 3. ca. 14. & 16. Britton, fol. 164. [c] Domesday, Herefordsc. Vid. de vant, Sect. 1. Sudra. Wendesford. Westchester.

\* Mich. 10 E. 3.  
Coram rege  
Willelm. T. III.

[d] For etimologies vid. Sect. 94. 154. 164. 204. 234. 267, 268, &amp;c.

[e] Fleta, lib. 3. ca. 14. Bracton, lib. 2. cap. 16. Britton, fol. 164.

And Bracton agreeth herewith. *Dicitur socagium* (saith he) *à socco, et inde tenentes dicuntur socmanni*, [b] *ed quod deputati sunt tantummodo ad culturam.* And Benerth signifieth the service of the plough and cart. It is to be observed, that in the book of [c] *Domesday*, land holden by knight's service was called Tainland, and land holden by socage was called Reveland; which appeareth in that it is said there, *hæc terra fuit tempore regis Edwardi Tainland, sed postea conversa est in Reveland.* (2) And in that booke they that held in socage were called by severall names, as *Sochemanni*, or *Sokemanni*, which still continueth; sometimes \* *Coleberti*, i. e. *qui tenent in liberum socagium per redditum*; and sometimes they are called *Radchenestres*, i. e. *liberi homines, qui tamen arabant, herciabant, falcabant, metebant, &c.* And here it appeareth how necessary it is, that words be fetched from their originals, and our author *est verus etymologus* both in this and in many other places in his [d] three bookes. And it is to be observed once for all, that the legall termination of (*agium*) in composition signifieth, service or duty; as *homagium*, the service of the man; *escuagium*, *servitium scuti*; [e] *socagium*, *servitium socæ*; *hidagium*, the duty to be paid for a hide or plough-land; and so of *cornagium*, *coragium*, *carnagium*, *cartagium*, *burgagium*, *villenagium*, and *guidagium*, (which one describeth thus) *quod datur alicui, ut tunc conducatur per loca alterius*, and the like.

[f] Mirron, ca. 2. sect. 18.

Fleta, ubi supra.

"*Insint que les services [f] ne sont pas services de chivaler.*" And in the next Section he saith, and every tenure that is not a tenure in chivalry is a tenure in socage. *Ex donationibus autem feoda militaria, vel magnam serjeantiam non continentibus, oritur nolis quoddam nomen generale, quod est socagium.* Here Littleton speaketh of tenures of common persons; for grand serjeantie is not knight's service, and yet it is not a tenure in socage, as shall be said hereafter. Also here he meaneth temporall services, and not frankalmoigne, as by the examples he put is manifest: and as in his proper place shall appeare more at large. Also here Littleton speaketh of socage largely taken, and so called *ab effectu*; that is, all tenures that have the like effects and incidents belonging to them as socage hath, are termed tenures in socage, albeit originally service of the plough was not reserved. As if originally a rose, a pair of gilt spurs, a rent, and such like

(1) [See Note 56.]

(2) [See Note 57.]

like were reserved, or that the tenants *in condemnatos ultrices manus mittant, ut alios suspendio, alios membrorum detruncatione, &c. puniant*, these are said to be tenures in socage *ab effectu*, for that there shall be like gardein in socage, like reliefe, and such other effects and incidents as a tenure in socage hath, and are so termed to distinguish the same from knight's service. Nay, the worst tenure that I have read of, of this kind, is to hold lands to be *ultor sceleratorum, condemnatorum, ut alios suspendio, alios membrorum detruncatione, vel aliis modis juxta quantitatem perpetrati sceleris puniat*, (that is) to be a hangman or executioner. It seemeth in ancient times such officers were not voluntaries, nor for lucre to be hired, unlesse they were bound thereunto by tenure. And so note, that some tenures in socage are named *à causâ*, and some, and the greater part, *ab effectu*.

Ockam, cap. quæ per solam consuetudinem, &c.

Ockam, fo. 31. a. & b.

"*Car homage de soy ne fait service de chivaler.*" But it is a presumption where homage is due, that the land is holden by knight's service, as hath beene said.

## Sect. 118.

(4. Co. 2.) **I**TEM, home peut tener de son seignior per fealty tantum, et tiel tenure est tenure en socage; car chescun tenure que n'est pas tenure in chivalry, est tenure en socage.

**A**LSO, a man may hold of his lord by fealty only, and such tenure is tenure in socage; for every tenure which is not tenure in chivalry, is a tenure in socage.

Of this sufficient hath beene said before.

## Sect. 119.

**E**T il est dit, que la cause, pur que tiel tenure est dit et ad le nosme de tenure en socage, est ceo; quia socagium idem est quod servitium socæ, et soca idem est quod caruca, scil. un soke ou un carue. Et en ancien temps, devant le limitation de temps de memorie, grand part de les tenants, que tyendront de leur seigniors per socage, devoient vner ove leur sokes, chescun de les dits tenants pur certain jours per an pur arer et semer les demesnes le seignior. Et pur ceo que tielx overages fueront fait pur le viver et sustenance de leur seigniors, ils fueront quits envers leur seigniors de tous maners de services, &c. Et pur ceo que tielx services fueront faits ove leur sokes, tiel tenure fuit appel tenure en socage. Et puis apres tiels services fueront changes  
en

**A**ND it is said, that the reason, why such tenure is called and hath the name of tenure in socage, is this: because *socagium idem est quod servitium socæ*, and *soca idem est quod caruca*, &c. i. e. a soke or a plough. In ancient time, before the limitation of time of memory, a great part of the tenants, which held of their lords by socage, ought to come with their ploughes, every of the said tenants for certaine daies in the yeare to plough and sow the demesnes of the lord. And for that such workes were done for the livelihood and sustenance of their lord, they were quit against their lord of all manner of services, &c. And because that such services were done with their ploughs, this tenure was called tenure in socage.  
And

*en denyers, per consent des tenants et per desire des seigniors, scil. en un annuall rent, &c. Mes uncore le noame de socage demurt, et en divers lieux les tenants uncore font tiels services ove lour sokes a lour seigniors ; issint que tous maners de tenures, que ne sont pas tenures per service de chivaler, sont appels tenures en socage.*

And afterward these services were changed into money, by the consent of the tenants and by the desire of the lords, viz. into an annuall rent, &c. But yet the name of socage remaineth, and in divers places the tenants yet doe such services with their ploughes to their lords; so that all manner of tenures, which are not tenures by knight's service, are called tenures in socage.

(6. Co. 59.)  
Cap. Burgage,  
Sect. 170.  
Mirror, cap. 2.  
sect. 18. Vid.  
10 E. 2.  
Avoerie 224.  
3 E. 2. Action  
sur le stat. 24.  
10 E. 3. 24.  
20 E. 3.  
Avoerie 154.  
30 E. 3. 17.  
30. Ass. p. 3.  
20. Ass. 1.  
Cap. Confirmation.  
Sect. 439.

“**T**EMPS de memory.” Time of memory is when no man alive hath had any prooffe to the contrary, nor hath any consunance to the contrary, as shall be hereafter said in [86. b.] his proper place. And of necessity this change hereafter spoken of, must be before time of memorie; for within time of memory, the services of the plough cannot be changed into money by consent of the tenant and the desire of the lords, *scilicet*, into an annuall rent, neither by release or confirmation or other conveyance, so long as the seignory remaineth, as shall be said in his due place.

“*Devoient venter ove lour sokes.*” The plough is named *propter excellentiam*; but the sickle, and the syth, for the reaping in harvest, and such like, are also included. For as *carucata terra*, a plough-land, may containe houses, milles, pasture, meadow, wood, &c. as pertaining to the plough; so under the service of the plough, all services of tillage or husbandry are included.

“*Uncore le noame de socage demurt.*” Altho’ the cause whereupon the name of socage first grew be taken away, yet the name remaines the same it hath been, and is used to distinguish this tenure from a tenure by knight’s service. *Nomina si nescis, peris cognitio rerum. Et nomina si perdas, cert<sup>o</sup> distinctio rerum perditur.* [87. a.] Therefore the names of things (as *Littleton* here teacheth) are for avoyding of confusion diligently to be observed.

## Sect. 120.

**I**TEM, si hometient de son seignior per escuage certaine, scil. en tiel forme, quant l’escuage curge et est assese per parliament a greinder somme ou meinder somme, que le tenant paiera a son seignior forsque demy marke pur escuage, et nient plus ne miens, a quel graund somme ou a quel petite somme que l’escuage curge, &c. tiel tenure est tenure en socage, et nemy service de chivalrie. Mes lou le somme que le tenant paiera pur l’escuage est non certaine,

**A**LSO, if a man holdeth of his lord by escuage certaine, *scil.* in this manner, when the escuage runneth and is assessed by parliament to a greater or lesser sum, that the tenant shall pay to his lord but halfe a marke for escuage, and no more nor lesse, to how great a sum, or to how little the escuage runneth, &c. such tenure is tenure in socage, and not knight’s service. But where the somme which the tenant shall pay for escuage is uncertaine,



*taine, scil. lou il poit estre que le somme que le tenant paiera pur l'escuage a son seignior poit estre a un foits le greinder et a auter foits le meinder, solonque ceo que est assesse, &c. donques tiel tenure est tenure per service de chivaler.*

certaine, scil. where it may be that the summe that the tenant shall pay for escuage to his lord, may be at one time more and at another time less, according as it is assessed, &c. such tenure is tenure by knight's service.

"**E**SCUAGE certain" is not *in rei veritate servitium scuti*, which is to be done by the body of a man, but it is *servitium crumene*, of money, which is to be drawne out of the purse, and that is in effect a tenure in socage; wherein it is to be observed, that the service of payment of money is the more base, and lesse profitable for the commonwealth in this case; and hereof somewhat hath been said before in the Chapter of Escuage, Sect. 98, 99.

If a man hold by homage, fealty and escuage, *scil.* by an halfe penny, when escuage runs at fortie shillings, this is a tenure in socage, and no knight's service, for two causes.

First, it is socage tenure, because of the certainty; for to the tenure in socage *certa servitia* doe ever belong, so as the husbandman may the rather live in quiet.

excellently resolved in parliament. Hill. 3 E. 2. coram Rege Rot. 34. Agnes Frowick's case.

Secondly, Escuage is to be paid at every time when it is assessec; and here it is not to be paid, but when it amounteth to forty shillings.

(3 Co. 6. b.)

15 E. 2. tit. Avowrie 216.  
31 E. 1. Ass.  
441. 26. Ass. 66.  
6 E. 3. 6.

5 E. 4. 128.  
Vid. Rot. Parl.  
4 E. 3. nu. 19.  
Clavering's case.

## Sect. 121.

**I**TEM, *si home tient sa terre pur paier certaine rent a son seignior pur castle-garde, tiel tenure est tenure en socage. Mes lou le tenant doit per luy meme ou per un auter faire castle-garde, tiel tenure est tenure per service de chivaler.*

**A**LSO, if a man holdeth his land to pay a certaine rent to his lord for castle-gard, this tenure is tenure in socage (1). But where the tenant ought by himself or by another to doe castle-gard, such tenure is tenure by knights service.

[87. b.] **H**EREIN the difference standeth thus. If a rent be paid for castle-garde, it is cleere a socage tenure, as it is agreed in *Lutterel's* case according to *Littleton's* opinion. But if a summe in grosse, or other thing, be voluntarily paid or given by the tenant, and voluntarily received by the lord in lieu of castle-gard, yet the tenure by knight's service remaineth. Vide Sect. 98. & 99.

Vid. Sect. 98, 99.

Vide 4. Co. 88.  
In *Lutterel's* case.  
19 R. 2.  
Gard. 196.  
26 Ass. 66.  
F. N. B. 83. 286.  
6 Co. 29. *Gregories* case.

(1) [See Note 58.]

## Sect. 122.

**I**TEM, en tous casz lou le tenant tient del seignior a paier a luy ascun certaine rent, cel rent est appelle rent service.

**A**LSO, in all cases where the tenant holdeth of his lord to pay unto him any certaine rent, this rent is called rent service.

**I**T is called rent service, because it is accompanied with some corporal service, as fealty at the least; in respect whereof the lord may distraine for it of common right. See more of this matter in the Chapter of Rents.

## Sect. 123.

**I**TEM, en tielx tenures en socage, si le tenant ad issue et devie, son issue esteant deins l'age de 14 ans, donques le prochain amy del heire (1), a que le heritage ne poit descendre, avera la garde de la terre et del heir jesque al age del heir de 14 ans, et tiel gardein est appelle gardein en socage. Car si la terre descendist al heire de part le pier, donques la mere, on auter procheine cosen de part la mere, avera la garde. Et si le terre descendist al heire de part la mere, donques le pier ou le prochain amy de part del pier avera le garde de tielx terres ou tenements. Et quant l'heire vient al age de 14 ans compleat, il poit enter et ouster le gardein en socage, et occuper la terre luy mesme, s'il voit. Et tiel gardeine en socage ne prenda ascuns issues ou profits de tielx terres ou tenements a son use demesne, mes tantsolement al use et profit del heire; et del ceo il rendra accompt al heire, quant pleast al heire apres ceo que l'heire accomplist l'age de xiiii. ans. Mes tiel gardein sur son accompt avera allowance de tous ses reasonable costs et expences en tous choses, &c. Et si tiel gardein maria l'heire deins xiiii. ans, il accomptera al heire, ou a ses executors, de value del mariage, coment que il ne prist riens pur le value del mariage;

**A**LSO, in such tenures in socage, if the tenant have issue and die, his issue being within the age of 14 yeares, then the next friend of that heire, to whom the inheritance cannot descend, shall have the wardship of the land and of the heire untill the age of 14 yeares, and such gardeine is called gardeine in socage. For if the land descend to the heire of the part of the father, then the mother, or other next cousin of the part of the mother, shall have the wardship. And if land descend to the heir of the part of the mother, then the father or next friend of the part of the father shall have the wardship of such lands or tenements. And when the heyre cometh to the age of 14 yeares complete, he may enter and oust the gardian in socage, and occupy the land himselfe, if he will. And such gardian in socage shal not take any issues or profits of such lands or tenements to his own use, but only to the use and profit of the heire; and of this he shal render an account to the heire, when it pleaseth the heire after he accomplisheth the age of 14 yeares. But such gardian upon his account shall have allowance of all his reasonable costs and expences in all things, &c.

(1) [See Note 59.]

*mariage; pur ceo que il serra rette sa folly demesne, que il luy voiloit marier sans prendre la value del mariage, sinon que il luy maria a tiel mariage, que est tant en value come le mariage del heire, &c.*

for it shall be accounted his own folly, that he would marry him without taking the value of the mariage, unles that he marrieth him to such a marriage, that is as much worth in value as the marriage of the heire.

&c. And if such gardian marry the heire within age of 14 yeares, he shall account to the heire, or his executors, of the value of the mariage, although that he tooke nothing for the value of the mariage;

**E***N tiels tenures en socage.*" If a man be seised of a rent charge, rent secke, common of pasture, and such like inheritances, which doe not lie in tenure, and dyeth, his heire within age of 14 yeares; in this case the heire may choose his gardein: but if he be of such tender yeares as he can make no choice, then (if the father hath made no disposition of the custody of the childe) it were most fit, that the next of kin, to whom the inheritance cannot descend, should have the custody of him (2). And whosoever taketh the rent, &c. the heire shall charge him in an account. But if he

[88. a.] hold any land in socage, in that case the gardian in socage shall take into his custody as well the rent charges, &c. as the land holden in socage, because he hath the custody of the heire.

*"Si le tenant ad issue et devic."* The same law it is if the tenant hath no issue, but a brother or cosin within age of 14 yeares at the time of his death. [a] Also this doth extend as well to issue female, as to issue male.

*"Deins l'age de 14 ans."* Of this sufficient hath been spoken in the next preceding Chapter.

*"Donques le procheine amy del heire, a que le enheritance ne poit discender."* The next friend of the heire, &c. Here amy or fr'nd is taken for the next of blood. So the effect of it is, that the next of his blood to whom the inheritance cannot discend, whereby affinity without blood is excluded.

*"Le prochein,"* the next.

[b] If there be three brethren, and the youngest holdeth land in socage, and hath issue and dieth his issue within age of 14 yeares, both the uncles are in equall degree, and yet the eldest shall be gardian; because in equall degree the law preferreth him. [c] And yet if lands holden in socage be given to a man and to the heirs of his body, and he dyeth his heire within age, the next cosin of the part of the father, albeit he be worthier, shall not be preferred before the next cosin of the part of the mother, but such of them as first seaseth the heire shall have his custody (1). But if lands be given in frankmariage, and the donees have issue and dye their issue within age of 14 yeares, the next of kin of the part of the mother shall have the custody of the body, and not the next of kin of the part of the father, albeit he first seased it, because the mother was the cause

(2. Ro. Abr. 40.)

Vide le statuts de 4 & 5 Ph. & Marie cap. 8.

[a] 10 R. 2. Account 132.

Glanvil. lib. 7. cap. 11. Bleton, 163. Fleta, lib. 1. cap. 5. Stat. de Hibernia, tit. Partition. (Flowd. 446.)

[b] Vid. 30. Ass. 47.

[c] Pl. Com. Carrel's case.

47 H. 3. Gard. 146. (2. Ro. Abr. 40. Ante 22. a.)

(2) See post. 88. b.

[88. a.]

(1) This is according to the rule, *in equali*

*jure melior est conditio possidentis.* Flowd. 296. in Carrel's case. See too Hawk. Abr. of Co. Litt.

cause of the gift. If a man be seised of lands holden in socage of the part of his father, and of other lands holden in socage of the part of his mother, and dyeth his issue being within the age of 14 yeares, in this case such of the next of kinne of either side, as first happeth the body of the heire, shall have him (1); [88. b.] but the next of blood of the part of the father shall enter into the lands of the part of the mother, and the next of kinne of the part of the mother shall enter into the lands of the part of the father (2).

[d] If *A.* be gardian in socage of the body and lands of *B.* within the age of fourteene yeares, *A.* shall be gardian in socage *per cause de gard* (3). But an infant within age, that [e] is not in the custody of another, cannot be gardian in socage; because no writ of account lyeth against an infant. And herewith agreeth *Bract*. [f] and yeeldeth this reason, *aliud regere non potest, qui seipsum regere non novit*. And *Fleta* saith, [h] that *minor minorem custodire non debet; alios enim presumitur male regere, qui seipsum regere necit*. And by like reason an ideot, a man *non compos mentis*, a lunaticke, a man *cæcus et mutus*, or *surdus et mutus*, or a leper removed by a writ of *leproso amovendo*, cannot be gardian in socage. But in the case of gard *per cause de gard*, there lyeth an action of account against *A.* in the case abovesaid.

[d] F. N. B. 159.  
b. Regie.

[e] v. E. 3. 46.  
16 E. 3. ass. 52.  
21 E. 3. 2.  
31 E. 3. Endint  
9. 17 E. 2.  
Account 121.  
26 E. 3. 63.  
10 H. 6. 14.  
F. N. B. 119.  
[f] Domes. b. 2.  
c. 20.  
[h] Flet. l. 1.  
ca. 10.

[i] Lib. Rub.  
cap. 70.

[k] Glanvil. lib. 7.  
ca. 11.  
[l] Pl. Com.  
Carre's case.  
(2 Ro. Abr. 40.  
Cro. Elix. 225.  
M. 634.)  
[m] Lit. lib. 1.  
ca. 2, 3.

[n] Bract. lib. 2.  
ca. 37.  
Brit. 26, 163. b.  
Flet. lib. 1. c. 9.  
26 E. 1. Sect. 1.  
Fortesc. c. 40.

[o] Fortesc. ubi  
supra. Statut. de  
Homagio capi-  
endo, tempo-  
re 1.

"*A que le heritage ne poet descender.*" [i] *Nullus hereditatem suo propinquo vel extraneo periculosa sanè* (4) *custodia committatur*. Note [k] this word (*poet*) may or can. [l] And therefore this doth not onely exclude an immediate discent, but all possibility of discent. As if a man hath issue two sons by several venters, and having lands holden in socage of the nature of burgh *English* dieth the yonger brother within age of 14 yeares, [m] the elder brother of the halfe blood shall not have the custody of the land (5); because by possibility the elder may inherit the land; for if the yongest dye without issue, and the land discent to an uncle, the elder brother of the halfe blood may be heire unto him: and herewith doth agree our ancient authors. [n] *Hæres sokmanni sub custodiâ capitalium dominorum non erit, sed sub custodiâ consanguineorum suorum propinquorum, hoc est, eorum qui conjuncti sunt jure sanguinis, et non jure successionis, ex parte quorum non descendit hereditas; et regulariter verum est, quodd nunquam remanebit aliquis in custodiâ alicujus, de quo haberi possit suspicio, quodd vellet jus clamare in ipsâ hereditate, et unde si plures sint filia et hæredes tenere debeant in socagio, nulla debet esse in custodiâ alterius*. [o] And this is contrary to the civil law; for *leges civiles impuberum tutelas proximis de eorum sanguine committunt, sive agnati fuerint, sive cognati, unicuique, videlicet, secundum gradum et ordinem, qui in hereditate pupilli succedurus est*. But this the law of England saith, *est quasi agnum lupo committere ad devorandum* (6).

"*Donques la mere.*" Note, albeit land cannot discent to the mother from her sonne, (as hath beene said) because inheritance cannot ascend, yet here it appeareth by *Littleton*, that she is next of blood (7), for that none (as hath beene said) can be gardian in socage

(1) See ante 88. a. note 1.

(2) [See Note 60.]

(3) [See Note 61.]

(4) *Sanè* instead of *sanè* seems necessary to the sense of this passage.

(5) [See Note 62.]

(6) [See Note 63.]

(7) As to the construction of the words *next of blood* in other cases, see ante 10. b. and note 2. there.

cage but the next of blood; and the like is to be said of the father, as hereafter next appeareth.

*"Donques le pier."* By this it appeareth, that the father in case of a tenure in socage shall be gardian in socage, and shall not have the custody of his eldest sonne, in respect of his paternall naturall custody, (as he shall have in case of a tenure by knights service, as before appeareth) (8) but as gardian in socage. And the reason of the diversity is, for that in the case of a tenure in socage, the father must by law be accountable to the sonne both for his marriage, and also for the profits of his lands, which he should not be if he had the custody of his eldest sonne in this case as his father in respect of nature (9), and the act of law never doth any man wrong.

But no lord or other person, in respect of any tenure by knights service or otherwise, shall have the custody of any childe that is heire apparant to his father, but the father only during his life, as hath bene said before. (10)

It is to be observed, that in the lawes of *England*, there are three manner of gardianships, viz. by the common law, by statute law, and by custome. By the common law there are foure manner of gardians, viz. gardian in chivalry (whom *Littleton* hath described before, Sect. 103, &c. (11) gardian by nature, as the father of the eldest son, of whom *Littleton* hath spoken Sect. 114, (12) gardian in socage, treated of by *Littleton* in this Section, and gardian *per cause de nurture*; (13) all frequent in [a] our books. By statute, viz. the statute in 4 and 5 *Ph. & Mar.* of women children, and that is in two manners, either of the father or mother (14) without assignation, or of any other to whom the father shall appoint the custody, either by his last will, or by any act in his life-time, whereof you shall reade at large [b] in *Ratcliffe's* case in my Reports (15). [c] Lastly, by custome, as of orphans by the custome of the city of *London*, and of other cities and boroughs (16).

[a] 8 E. 3. 43.  
8 E. 4. 5.  
(3. Co. 37.)

[b] 3. Co. 57.  
*Ratcliffe's* case.  
[c] 32 E. 3.  
Gard. 31.  
8 R. 2. Gard. 166.  
(Cro. Jam. 99.)

*"Tantolement al use et profit del heire."* And therefore gardian in socage shall not forfeit his interest by outlawrie or attainder of felony or treason; because he hath nothing to his owne use, but to the use of the heire.

[89. a.] Also if the mother be gardian in socage, and taketh husband, and dyeth, the husband shall not have this custody by survivour; because the wife had it *en auter droit*, in the right of the heire.

Fl. Com.  
(3. Co. 39.)

A gardian in socage shall not [d] present to a benefice in the right of the heire; because he cannot be accountable therefore, for that he can make no benefit thereof, for the law doth abhorre simony, or any corrupt contract for benefices; and therefore in that case the heire shall present himselfe (1). And *Britton* speaking of these gardians said well, *les queux gardeins sont plus servans que gardeins*, (that is) which gardians are rather servants then gardians.

[d] 8 E. 2.  
Presentm. 10.  
7 E. 39.  
27 E. 3. 89.  
20 E. 3. 5.  
F. N. B. 33.  
31 E. 3. *Ecce*  
pel 340.  
*Britton*, 163, 164.  
*Fleta*, lib. 1. cap. 10.  
(2. Ro. Abr. 41.  
Cro. Jam. 99.  
3. Inst. 156.  
For. 120. a.)

"II

(8) Ante 84. b.

(9) [See Note 64.]

(10) Ante 84. a.

(11) [See Note 65.]

(12) [See Note 66.]

(13) [See Note 67.]

(14) [See Note 68.]

(15) [See Note 69.]

(16) [See Note 70.]

[89. b.]

(1) [See Note 71.]

"*Il rendra account, &c. apres que l'heire ad accomplishe l'age de 14 ans.*" This point hath beene much controverted in our bookes, and the causes of the doubts have beene, 1. Upon the words of the statute of [e] *Merlebridge*, ca. 17. 2. Upon the originall writ of account against the gardian in socage. The words of the statute be, *cum ad legitimam etatem pervenerit sibi respondeat, &c.* and *legitima etas* [f] lawfull age is xxi. yeares. Also the writ of accompt reciteth the said statute, *quare cum de communi consilio regni nostri provisum sit, quod custodes terrarum & tenementorum, que tenentur in socagio, heredibus terrarum & tenementorum illorum, cum ad plenam etatem pervenerint, reddant rationabilem computum.* [g] Whereupon it is gathered that no action of account did lye against the gardian in socage at the common law, untill the heire be of his lawfull age of 21 yeares. But as to the first (*legitima etas*) as the statute [h] speaketh, or *plena etas* (as the writ doth render it) are to be understood *secundum subjectam materiam*, that is of the heire of socage land, whose lawfull and full age as to the custody of guardianship is 14. And as to the recitall of the statute, [i] it is evident that an action of account did lye against gardian in socage at the common law; and that the statute was made in affirmance or declaration of the common law; for the statute speaketh onely *de custodia parentum*, that is of a gardian in right; but yet an action of account lyeth against him that occupieth the land as gardian, albeit he be not of the blood (as hereafter shall be said). And upon consideration had of the said statute and of all the bookes, it was adjudged in the court of common pleas, *Paech. 16. Eliz. Rot. 436.* according to the opinion of *Littleton*, that the heire after the age of 14 yeares shall have an action of account against the garden in socage, when he will at his pleasure; and so is an ancient question well resolved (2).

*Britton* was of opinion, that the statute of *Merlebridge*, which gave the *capias* in account, extended to gardian in socage, for he wrote before the statute of *W. 2. c. 11.* But later bookes have overruled this point, that no *capias* lyeth against gardian in socage, for the statute extendeth to bailifes only. Neither doth the statute of *W. 2.* extend to gardian in socage, for that speaketh only *de servicibus, ballivis, camerariis, & receptoribus.*

"*Mes tiel gardein sur son account avera allowance de tous ses reasonable costs et expenses en tous choses.*" (3) And this is due to all accountants by the common law (4); and so it is declared by the said statute of *Merlebridge*, *salvis iphis custodibus rationabilibus suis suis.*

"*Allowance.*" What other allowances shall the gardian have? If the gardian receive the rents and profits of the lands, and be robbed of the same, whether shall he be discharged thereof upon his account? And it seemeth, that if he be robbed without his default or negligence he shall be discharged thereof (5). As if a bailife of a manor, or a receiver, or a factor of a merchant, or the like accountant, be robbed, he shall be discharged thereof upon his account. And seeing the gardian shall be charged as bailife after the heire's age of 14, and be discharged upon his account if he be robbed, *pari ratione* if he be robbed before the age of 14. But otherwise

[e] It is called the statute of *Merlebridge*, because the parliament in 3 H. 3. was holden there.

[f] 16 E. 3.

West. 100.

18 E. 3. 86. 77.

20 E. 3. 5.

Vide 38 E. 3.

Gard. 31.

F. N. B. 118.

6 E. 3. 38.

[g] 16 E. 3.

Account 130.

17 E. 3. ibid. 131.

[h] 3 E. 3. Account 14 E. 3.

ib. 3 Mar. Dy.

137. Keylwey

131.

[i] 16 E. 3.

Avowry 230.

(3 Inst. 380.

Cro. Cha. 230.)

Paech. 16 Eliz.

Rot. 436. in

communi banco.

Mirror, ca. 2.

sect. 17.

Britton, fol.

163. b.

Fleta, lib. 2.

cap. 64. 18 E. 2.

Avowry 230.

17 E. 3. 89.

Merlebr. ca. 29.

W. 2. ca. 11.

The statute of *Merlebridge* intended by Litt. is ca. 17.

41 E. 3. 3.

23 Ass. 41.

23 E. 3.

Account 111.

20 Am. 25.

3 H. 7. 4. b.

6 H. 7. 12.

10 H. 7. 25.

10 H. 6. 51.

9 E. 4. 15.

Doct. & Stud.

a. 38. fo. 130.

(Cro. Eliz. 219.

1 Ro. Ab. 2, 3.

124.)

(2) [See Note 72.]

(3) [See Note 73.]

(4) [See Note 74.]

(5) [See Note 75.]

wise it is of a carier, for he hath his hire (6), and thereby implicitly undertaketh the safe delivery of the goods delivered to him, and therefore he shall answer the value of them if he be robbed of them (7). Note the diversity, and so it was resolved \* in the king's bench.

So it is if goods be delivered to a man to be safely kept, and after those goods are stolen from him, this shall not excuse him; because by the acceptance he undertook to keepe them safely, and therefore he must keepe them at his perill.

So it is if goods be delivered to one to be kept, for to be kept and to be safely kept is all one in law (9). But if the goods be delivered to him to be kept as he would keepe his owne, there if they be stolen from him without his default or negligence, he shall be discharged. So if goods be delivered to one as a gage or pledge, and they be stolen, he shall be discharged; because he hath a property in them (10), and therefore he ought to keepe them no otherwise then his owne; but if he that gaged him, tendred the money before the stealing, and the other refused to deliver them, then for this default in him he shall be charged.

If *A.* leave a chest locked with *B.* to be kept, and taketh away the key with him, and acquainteth not *B.* what is in the chest, and the chest together with the goods of *B.* are stolen away; *B.* shall not be charged therewith, because *A.* did not trust *B.* with them, as this case is (1). And that which hath beene said before of stealing, is to be understood also of other like accidents, as shipwracke by sea, fire by lightning, and other like inevitable accidents (2). And all these cases were resolved, and adjudged in the king's bench.\* And by these diversities are all the bookes concerning this point reconciled (3).

Note, reader, it is necessary for any that receiveth goods to be kept, to receive them in this speciall manner, viz. to be kept as his owne, or to keep them at the perill of the owner (4). But now is *Littleton* to be further heard.

“*Et si tiel gardein maria le heire deins 14 ans, &c.*” For if he marry the heire after 14, he is out of his custody, and no account shall be made therefore.

“*Il accountera a luy.*” He shall account for the mariage of the heire, viz. for so much as any man *bonâ fide* had offered for the mariage, or would give in mariage unto him.

“*Ou a ses executors.*” Not (5) that an infant of the age of 14 may make his will (as some hereupon have collected); but the meaning of *Littleton* is, that if after his mariage he accomplish his age of 18 yeares, at what time he may make his testament (6), and constitute

\* Hil. 38 Eliz. inter Woodliffe and Curties. (8) 4. Co. 83. b. Cro. Eliz. 815. Cro. Jam. 188. Noy 136.) 39. Ass. p. 38. (Cro. Jam. 188, 189.)

8 E. 2. tit. Detinue 89. (8. Co. 33. 5. Co. 13. b.) (Doct. & Stud. 129. b.)

\* Pasch. 43 Eliz. inter Southcote & Bennet, in Detinue. (4. Co. 83. b.)

(1. Ro. Abr. 908. 910.) Chro. Cha. 79.)

(6) [See Note 76.]

(7) [See Note 77.]

(8) S. C. Mo. 462. Ow. 57. 1. Ro. Abr. 2.

(9) [See Note 78.]

(10) [See Note 79.]

[89. a.]

(1) [See Note 80.]

(2) [See Note 81.]

(3) [See Note 82.]

(4) We have already observed, that in general this distinction is now exploded. Ante 89. a. note 9. See further tit. *Bailment and Carrier* in New Abr. tit. *Bailment and Action for Negligence* in Vin. tit. *Action on the case for misfeasance* in Com. Dig. Law of Nisi Prius ed. 1775. p. 69.

(5) It is note in all the former editions, but not is apparently the true reading.

(6) [See Note 83.]

7 E. 3. 62.  
19 E. 3.  
Account 66.  
30 E. 3. 7.  
32 E. 3. 28.  
Account 67.

stitute executors for his goods and chattells, and the words are so to be understood, as may stand with law and reason. Note, executors could not have an action of account at the common law, in respect of the privacy of the account; but the statute of *W. 2. ca. 23.* hath given the action of account to executors, the statute of *25 E. 3. ca. 5.* to executors of executors, and the statute of *31 E. 3. c. 11.* to administrators.

2 E. 3. 19.  
46 E. 3.  
Account 40.  
2 E. 3. ibid. 45.  
6 E. 3. Account 47.

"*Que il voille luy marier sans prendre le value.*" So as the gardian shall not account only for that which he shall receive in this case, but for that also which he might receive.

"*Sinon que il luy marier a tel mariage que est tant en value, &c.*" This needeth no explanation.

HEIL 3 E. 2.  
coram Rege,  
Rot. 34. Agnes  
Frowick's case.  
F. N. B. 139.  
1. & 140.  
26 E. 3. 65.  
1 E. 3. 19, 20.

If the heire in socage be ravished out of the custody of the gardian, and the ravisher marieth the heire, the gardian shall have a writ of ravishment of ward, and recover the value of the mariage, &c. and shall account to the heire for the same.

And the gardian in socage is bounden by law, that the heire be well brought up, and that his evidences be safely kept.

Trin. 1 H. 5.  
coram Rege,  
Rot. 1. Midd.

The grandmother of the sonne and heire of *John Bernacvill*, who held the manor of *Totington* in the county of *Midd.* in socage, recovered the heire in a ravishment of ward against *Simon Chevin*, which had married the stepmother of the heire; and by the rule of the court, the plaintife *pro nutritura heredis et pro custodia evidenciarum invenit plegios.*

## Sect. 124.

**E**T si ascun auter home, que n'est procheine amy, occupee les terres ou tenements del heire come gardeine en socage il serra compell' de render accompt al heire, auxi bien sicome il fuissoyt prochein amy; car il n'est pas plee pur luy en brieve d'accompt a dire, que il n'est prochein amie, &c. mes il respondra le quel il ad occupee les terres ou tenements come gardeine en socage ou nemy. Sed quære, si apres ceo que le heire ad accomplish l'age de 14 ans, et gardeine en socage continualment occupia la terre tanque l'heire vient a plein age, scil. 21 ans, si le heire a son plein age avera action d'accompt envers le gardein de temps que il occupia apres les dits 14 ans, come envers gardeine en socage, ou envers luy come son baylife.

**A**ND if any other man, who is not the next friend, occupies the lands or tenements of the heire as gardian in socage, he shall be compelled to yeeld an account to the heire, as wel as if he had beene next friend; for it is no plea for him in the writ of account to say, that he is not the next friend, &c. but he shall answer whether he hath occupied the lands or tenements as gardian in socage or no. But quære, if after the heire hath accomplished the age of 14 yeares, and the gardian in socage continually occupieth the land until the heire comes to full age, scil. of 21 yeares, if the heire at his full age shall have an action of account against the gardian, from the time that he occupied after the said 14 yeares, as gardian in socage, or against him as his baylife.

"Et



"**E**T si ascun auter home, que n'est pas procheine amy, &c." If a stranger entrench into the lands of the infant within age of 14, and taketh the profits of the same, the infant may charge him as gardian in socage. And this doth well agree with the writ of account against a gardian in socage; for the words be, *Idem B. praefato A. rationabilem computum suum de exitibus provenientibus de terris et tenementis suis in N. quae tenentur in socagio, et quorum custodiam idem B. habuit dum praed. A. infra aetatem fuit, ut dicitur.* And true it is, that in judgement of law he had the custody of the lands: and he is called *tutor alienus*, and the right gardian in socage *tutor proprius*; and it is no plea for him to denie that he is *prochein amy*, but he must answer to the taking of the profits (1), as *Littleton* here saith.

"*Sed quere, &c.*" This *quere* came not out of *Littleton's* quiver; for it is evident, that after the age of 14 yeares he shall be charged as bailife, at any time when the heire will, either before his age of 21 yeares, or after (2).

19 E. 2.  
Avovery 281.  
39 E. 3. 10.  
41 E. 3. Account 37.  
49 E. 3. 10.  
18 E. 3. 17.  
22. Ass. p. 11.  
F1. Com. 542.  
6 E. 3. 32.  
7 N. B. 112.

13 E. 3.  
Account 77.  
23 E. 3. 11.  
41 E. 3.  
Account 36.  
10 H. 7. 7.  
4 H. 7. 6. b.  
7 H. 7. 2. a.  
6 E. 3. 32.  
38 E. 3.  
Account 60.  
7 E. 4.  
F. N. B. 112.

## Sect. 125.

**I**TEM, si gardein en chivalrie face ses executors et devy, le heire esteant deins age, &c. les executors averont le garde durant le nonage, &c. Mes si gardein en socage face ses executors et devy, le heire esteant deins l'age de 14 ans, ses executors n'averont pas le garde; mes un auter procheine amy, a que le heritage ne poyt my discender, avera la garde, &c. Et la cause de diversity est, pur ceo que gardein en chivalrie ad le garde a son proper use, et gardian en socage n'ad le garde a son use, mes al use del heire (1). Et en cas lou le gardein en socage devy deoant ascun accompt fait per luy al heire, de ceo le heire est sans remedie, pur ceo que nul briefe d'accompt gist envers les executors, si non pur le roy solement.

**A**LSO, if gardian in chivalrie makes his executors and die, the heire being within age, &c. the executors shall have the wardship during the nonage, &c. But if the gardian in socage make his executors and die, the heire being within the age of 14 yeares, his executors shall not have the wardship; but another next friend, to whom the inheritance cannot descend, shall have the wardship, &c. And the reason of this diversity is, because the gardian in chivalrie hath the wardship to his owne use, and the gardian in socage hath not the wardship to his owne use, but to the use of the heire. And in this case where the gardian in socage dyeth before any account made by him to the heire, of this the heire is without remedy, for that no writ of account lieth against the executors (2), but for the king onely.

"*A SON*

(1) [See Note 84.]

(2) Notwithstanding lord Coke's observation on the *quere*, it is in L. and M. Boh. P. and both of the MSS.

[90a b.]

(1) [See Note 86.]

(2) [See Note 87.]

7 R. 2. Br. 634.  
40 E. 3. 14.  
3 H. 4. 19.  
10 Eliz. Diet. 277.  
(Post. 117.)  
4 Co. 64. b.)  
7 H. 4. 41.  
44 E. 3. 62.

24 E. 3. 26:  
44 E. 3.  
F. N. B. 33.  
See more of this in  
the Chapter of  
Warranty,  
Sect. 740.  
(Cro. Jac. 248.

31 E. 3. Account  
87.  
19 E. 3. ibid. 146.  
48 E. 3. 2.  
2 H. 4. 13.  
F. N. B. 117.  
19 H. 6. 4.  
4 E. 4. 28.  
43 E. 3. 21.  
11 Co. 69.  
(3 Inst. 404.)  
[\*] Rot. Parl.  
80 E. 3. m. 123.

[a] Pl. Com. 331.  
Keylway 131.  
11 Co. 95.

Wid. Sect. 178.  
Stanf. Prer. 32.

[b] Fortescue  
10. 45. Rot. Parl.  
1 H. 4. m. 189.  
Pl. Com. 336.  
Stanf. Pl. Com.  
168. b. Stanf.  
Prer. 1. a. &  
30 b.  
[\*] Stanf. Prer.  
5. 10.

[c] Westm. 1.  
cap. 86.  
[d] Britton, fol. 57.  
[e] Regist. fol. 61,  
ccc.

"*ASON proper usc.*" A tenant holdeth land of a bishop by knights service, which seigniorie the bishop hath in the right of his bishoprick, the tenant dieth his heire within age, the bishop either before or after seisure dyeth; neither the king, nor the successor of the bishop, shall have the wardship, but his executors. For albeit the bishop hath the seigniorie *en auter droit*, yet the wardship being but a chattell, he hath in his own right, and a chattell cannot goe in the succession of a sole corporation, unless it be in the case of the king (3).

And yet if a bishop have an advowson, and the church become void, and the bishop die, neither the successor nor the executors shall present, but the king: because it is but a *chose in action* (4). And so it is in case where the king hath wardship, but that is a prerogative that belongeth to the king to provide for the church being void; for where the tenure by knights service is of a common person, the executors of the tenant shall present where the avoidance fell in the life of the tenant. [90. b.]

"*Le heire est sauns remedie, &c.*" For albeit in an action of account against a gardian in socage, &c. the defendant cannot wage his law, yet in respect of the privity of the matters of account, and the discharge resting in the knowledge of the parties thereunto, an action of account neither lyeth against the executors of the accountant, nor at the common law for the executors of him to whom the account is to be made, as is aforeiaid (3); but that is holpen by statute (4). [\*] It hath beene attempted in parliament to give an action of account against the executors of a gardian in socage, but never could be effected (5).

"*Si non fur le roy solement.*" [a] The reason of this is, because the king's treasure is the sinewes of warre, and the honour and safety of the king in time of peace, *firmamentum belli, et ornamentum pacis*; and therefore the death of the party shall not barre the king of his treasure due unto him upon the account, because it is intended, that the king was busied about the publicke for the good of the common-wealth, and had not leisure to call his accountant to make his account, *et nullum tempus occurrit regi*. Littleton speaketh of the king's prerogative but twice in all his bookes, viz. here, and Sect. 178. and in both places, as part of the lawes of England. *Prærogativa* [b] is derived of *præ*, i. e. *ante*, and *rogare*, that is, to aske or demand before-hand, whereof commeth *prærogativa*, and is denominated of the most excellent part; because though an act hath passed both the houses of the lords and commons in parliament, yet, before it be a law, the royall assent must be asked or demanded and obtained, and this is the proper sense of the word. But legally [\*] it extends to all powers, preheminences, and priviledges, which the law giveth to the crowne, whereof Littleton here speaketh of one. *Bract.* lib. 1. in one place calleth it *libertatem*, in another *privilegium regis*; [c] Britton [d] (following *W. 1.*) *droit le roy*; [e] *registr. jus regium*, and *ius regium corona, &c.*

[90. a.]  
(3) Acc. ante 9. a. 46. b. post. 388. a.  
(4) [See Note 85.]  
[90. b.]  
(3) [See Note 88.]

(4) [See Note 89.]  
(5) [See Note 90.]  
(6) See post. 119. a. and the note there.

## Sect. 126.

**I**TEM, le seignior, de que la terre est tenu en socage, apres le mort son tenant avera reliefe en tiel forme. Si le tenant tient per fealtie et certain rent a paier annualment, &c. si les termes de payment sont a payer per deux termes del an, ou per quater terms del an, le seignior avera del heire son tenant tant, come le rent amount, que il paya per an. Sicome le tenant tient de son seignior per fealtie, et x s. de rent payable a certaine termes del an, donques l'heire paiera al seignior x s. pur reliefe, ouster les x s. que il paiera pur le rent.

**A**LSO, the lord, of whom the land is holden in socage, after the decease of his tenant shall have reliefe in this manner. If the tenant holdeth by fealty and certaine rent to pay yeerely, &c. if the termes of payment be to pay at two termes of the yeare, or at 4 termes in the yeare, the lord shall have of the heire his tenant as much, as the rent amounts unto, which he payeth yearly. As if the tenant holds of his lord by fealty, and tenne shillings rent payable at certaine termes of the yeare, then the heire shall pay to the lord ten shillings for relief, beside the ten shillings which he payeth for the rent.

**"CERTAINE rent."** A tenant holdeth of his lord certaine lands in socage, to pay yearly a paire of gilt spurs or five shillings in money at the feast of *Easter*. In this case the rent is uncertaine, and the tenant may pay which of them he will at the said feast, and likewise the tenant may pay which of them he will for [91. a.] reliefe; but if he pay it not when he ought, then may the lord distraine for which of them he will. But if the tenure be to attend on his lord at the feast of *Christmasse*, or to pay ten shillings, there the reliefe must be ten shillings, because the other cannot be doubled. *Et sic de similibus*.

**"A paier annuelment."** If the tenant holdeth of his lord by fealty, and to pay everie two or three year ten shillings, albeit this be no annual rent, yet shall he pay ten shillings for reliefe. *Et sic de similibus*.

But it is to be noted, that beside reliefe, whereof *Littleton* here speaketh, there belongeth to a tenure in socage of common right aid for the making of his eldest son a knight at the age of fifteen yeares, and to marry his daughter at the age of 7 yeares (1).

43 E. 3. Barre  
204. 9. E. 4. 30.  
Bract. lib. 2.  
fol. 35.  
Glanvil. lib. 9.  
cap. 4.  
(2 Ro. Abr. 519.  
Foot. 145. a.)  
(2 Co. 37.  
2 Ro. Abr. 519.)

VID. Sect. 103.  
F. N. B. 82.  
West. 1. cap. 35.  
25. E. 3. stat. 4.  
cap. 11.

*En mesme le manner est, si home soit seisie de certaine terre que est tenu en socage, et fait feoffement en fee a son use, et morust seisie del use, (son heire del age de 14 ans ou plus, et nul. volunt per luy declare) le seignior avera reliefe del heire, sicome avant*

In the same manner it is, if a man be seised of certaine land which is holden in socage, and maketh a feoffement in fee to his owne use, and dieth seised of the use, (his heire of the age of 14 yeares or more, and no will by him declared)

(1) We have already had occasion to observe, that these aids are taken away by  
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the 12 Cha. 2. c. 24. Ant. 67. a. note 1.

*avant est dit. Et c'est per le statute de ann. 19 Hen. 7. cap. 15. (2).*

clared) the lord shall have reliefe of the heire, as afore is said. And this by the statute of 19 H. 7. cap. 15.

This is an addition to *Littleton*, whereof I omit it the rather, for that the statute of 19 H. 7. is for the cause above-mentioned become of none effect.

Sect. 127.

**E**T en tiel cas, apres la mort le tenant, tiel reliefe est due al seignior maintenant, de quel age que le heire soit ; pur ceo que tiel seignior ne poit aver le garde de corps, ne de terre le heire. Et le seignior en tiel case ne doit attendre a le payment de son reliefe, solonques les termes et jours de payment de rent ; mes il doit aver son reliefe maintenant, et pur ceo il poet incontinent (1) distraine apres le mort son tenant pur reliefe.

**A**ND in this case, after the death of the tenant, such reliefe is due to the lord presently, of what age soever the heire be ; because such lord cannot have the wardship of the body, nor of the land of the heire. And the lord in such case ought not to attend for the payment of his reliefe, according to the terms and dayes of payment of the rent ; but he is to have his reliefe presently, and therefore he may forthwith distreine after the death of his tenant for reliefe.

16 H. 7. 4.  
18 E. 3. 26.  
p. 18. Brocton,  
lib. 3. fol. 55.  
dabit hieres una  
vice redditum  
futurum unius anni  
duplicatum.  
Britton, fol. 178.  
acc. Fleta, lib. 1.  
cap. 2.  
(2. Ro. Abr. 519.)

**M**AINTENANT ;” and as *Littleton* saith, he ought not to attend the payment of his reliefe according to the daies of payment of his rent, but he ought to have his reliefe presently, and for the same he may incontinently distraine after the death of the tenant.

And therefore in the case aforesaid, where the tenant holdeth by the rent of five shillings, or a paire of gilt spurres, if the heire be not presently (that is, as presently and as conveniently as he may, all due circumstances considered) after the death of his ancestor ready upon the land to pay reliefe, the lord may distrain for which of them he will ; and if the tenant tendered either of them according to the law, and none for the lord was ready there to receive it, yet the lord may distraine for that which was tendered, at his pleasure (2).

45 E. 3. 19.  
33. H. 6. 52.  
20 Eliz. Dier  
361. Stanf.  
Præc. 13. b.  
F. N. B. 306. 359.

*“ De quel age que le heire soit.”* And yet it appeareth in our bookes, that in this case the king in case of a tenure in socage in chiefe shall not have *primer seisin*, unless the heire be of the age of 14 yeares at the death of his ancestor ; for if he be under that age, he is in the guard and custody of his *prochein amy*.

But otherwise it is in case of a common person, as here it appeareth. And where in some impressions these words be added (*issint que il passat l'age de 14 ans*), those words so added are against the law, and no part of *Littleton's* worke (3).

[91. b.]

(2) This part about relief from the heir of *cestui que use*, as Lord Coke truly observes, is in addition to *Littleton*; and it first appears in *Redman*. See post 117. a.

(1) [See Note 91.]

(2) See ant. 83. b. note 4.

(3) Accordingly the words objected to by lord Coke are neither in L. and M. nor Roh.—They were first inserted in F.

Sect.

## Sect. 128.

**E**N mesme le maner est, lou le tenant tient de son seignior per fealtie et un li. de peper ou cummin, et le tenant morust, le seignior avera pur relief un lib. de cummin, ou un lib. de peper, ouster le common rent. En mesme le maner est, lou tenant tient a payer per an certaine number de capons, ou de gallines, ou un paire de gaunts, ou certaine bushels de frument, et hujusmodi.

**I**N the same manner it is, where the tenant holdeth of his lord by fealtie and a pound of pepper or cummin, and the tenant dyeth, the lord shall have for reliefe a pound of cummin, or a pound of pepper, besides the common rent. In the same manner it is, where the tenant holdeth to pay yearly a number of capons or hennes, or a pair of gloves, or certaine bushels of corne, or such like.

**"UN lib. de peper ou cumyn."** Here it is to be observed, that (Fest. 148. a.) the lord may reserve pepper, or any other things that be *exotica*, foreign, of the growth of outlandish countreyes or beyond sea, as well as of the growth of *England*, whereby navigation (the life of every island) is employed. And where *Littleton* here putteth his case in the disjunctive, if the tenant doth hold by fealty and one pound of pepper or a pound of cummin, he shall pay for reliefe a pound of pepper or a pound of cummin, over and besides the rent. But if the tenant holdeth of his lord by doing of certaine worke dayes in harvest, or to attend at *Christmaas*, or such like, he shall not double the same: for of corporall service or labour or worke of the tenant, no reliefe is due, but where the tenant holdeth by such yearly rents or profits, which may be paid or delivered, whereof *Littleton* hath put his examples; and by them is manifestly proved, that corporall service, worke, or labour, shall not be doubled in this case. (4)

**"Ou certaine bushels de frument."** Here it appeareth, that the reliefe of bushels of corne is to be paid presently, though the tenant die in winter before corne be ripe.

[92. a.] Note, here are examples put of five natures. 1. *Aromatorum* (9 Ro. Abr. 515.) *exoticorum*, of species or drugs, of outlandish growth. 2. *Grannorum*, of corne of *English* growth. 3. *Avium villaticarum*, of powltry; as capons, hens, &c. 4. *Artificiorum*, of handicrafts; as a paire of gloves generally either of outlandish or *English*. 5. *Aut similibus*, or such like, (that is) of like outlandish growth, or of *English* growth, or of powltry, or of artifices outlandish or *English*. and like herein also, that they may be paid or delivered to the lord every year; or every second or third year, &c.

(4) But Rolle tells us, that master Herbert of the Inner Temple in his autumn reading 11 Cha. 1. held the contrary. 2. Ro. Abr. 515.

## Sect. 129.

**M**ES en aucun case le seignior doit demurrer a distreiner pur son reliefe jusque a certaine temps. Sicome le tenant tient de son seignior per un rose, ou per un bushel de roses, a paier al feast de Nativitie de Saint John Baptiste, si tiel tenant devie en yver, donque le seignior ne poit distreiner pur son reliefe, tanque al temps que les roses per le course del an poient aver leur cresser, &c. Et sic de similibus.

**B**UT in some case the lord ought to stay to distreine for his reliefe untill a certaine time. As if the tenant holds of his lord by a rose, or by a bushel of roses, to pay at the feast of St. John the Baptist, if such tenant dieth in winter then the lord cannot distreine for his reliefe, untill the time that roses by the course of the yeare may have their growth, &c. And so of the liké.

(Foot. 197. b.)

**P**ER le course del an." *Lex spectat naturæ ordinem*, The law respecteth the order and course of nature. *Lex non cogit ad impossibilia*, The law compells no man to impossible things. The argument *ab impossibili* is forcible in law. *Impossibile est quod naturæ rei repugnat*. And here it is to be observed, that *Littleton* puts a diversity betweene corne and roses; for corne will last. And therefore the tenant must deliver the corne presently before the time of growth (as before is said; and so of saffron, and the like. But roses, or other flowers, that are *fructus fugaces*, cannot be kept, and therefore are not to be delivered till the time of growing. Neither is the tenant driven by law artificially to preserve roses; for the law in these cases respecteth nature, and the course of the yeare, as *Littleton* here saith, *Et ars naturam imitatur. Et sic de similibus*.

## Sect. 130.

**I**TEM, si aucun voile demander, pur que home poit tener de son seignior per fealty tantselement pur tous maners de services, entant que quant le tenant ferra fealtie, il jurera a son seignior que il ferra a son seignior tous maners des services dues, et quant il ad fait fealtie, en tiel case nul autre service est due: a ceo il poyt estre dit, que lou un tenant tient sa terre de son seignior, il corient que il doit faire a son seignior aucun service. Car si le tenant ne ses heires decoyent faire nul manner de service al seignior ne a ses heires, donque per long temps continue il serroit hors de memorie et de remembrance, lequel la terre fuit tenus de le seignior ou de ses heires, ou nemy,

**A**LSO, if any will aske, why a man may hold of his lord by fealty only for all manner of services, insomuch as when the tenant shall doe his fealty, he shall sweare to his lord that he will doe to his lord all manner of services due, and when he hath done fealty, in this case no other service is due: to this it may be said, that where a tenant holds his land of his lord, it behooveth that he ought to do some service to his lord. For if the tenant nor his heires ought to do no manner of service to his lord nor his heires, then by long continuance of time it would grow out of memorie, whether the land were holden of the lord, or of

*nemy, et donques plus tost et plus rediment voilont homes dire, que la terre n'est pas tenus del seignior ou de ses heires, que auterment' et sur ceo le seignior perdra son escheat de la terre, ou per case auer forfeiture ou profit que il poet aver de le terre. Issint il est reason, que le seignior et ses heires ont uscun service fuyt a eux, pur prover et testifier, que la terre est tenus de eux.*

of his heires, or not, and then will men more often and more readily say, that the land is not holden of the lord, nor of his heires, than otherwise; and hereupon the lord shall lose his escheat of the land, or perchance some other forfeiture or profit which he might have of the land. So it is reason, that the lord and his heires have some service done unto them, to prove and testify, that the land is holden of them.

“**Q**UANT le tenant ferra fealty, il jurera a son seignior, &c.”

Here it appeareth, that the doing of the fealty is both a performance of his service, and of his oath also when it is done, for that no other service is due; and that one oath of fealty is taken of all that hold, and is not to be changed for any noveltie or nicety of invention; for judges anciently and continually have suppressed innovations, and would in no case change the ancient common law.

[92. b.] “*Il covient que il doit faire a son seignior ascun service.*” For there can be no tenure without some service; because the service maketh the tenure.

“*Son escheat de la terre.*” *Eschaeta* is derived of this word *eschier*, *quod est accidere*; for an escheat is a casuall profit, *quod accidit domino ex eventu et ex insperato*, which hapneth to the lord by chance and unlooked for. And of this word *eschaeta* commeth *eschaetor*, an eschaetor, so called, because his office is to enquire of all casuall profits, and them to seise into the king's hands, that the same may be answered to the king (1.)

Lands may escheat to the lord two manner of ways; one by attainder, the other without attainder. By attainder in three sorts. First, *Quia suspensus est per collum*, Secondly, *Quia abjuravit regnum* (2). Thirdly, *Quia utlegatus est*. Without attainder; as if the tenant dies without heire.

“*Ou per case auer forfeiture.*” As if the land be aliened in mortmaine; or when *Littleton* wrote, if the tenants had erected crosses upon their houses or tenements in prejudice of their lords, that the tenants might claim the privilege of the *Hospitalers* to defend themselves against their lords, they had forfeited their tenancies. But since *Littleton* wrote, the *Hospitalers* are dissolved, and consequently that forfeiture is gone.

“*Ou profit.*” As *reliefe*, *aïd pur file marier*, *aïd pur faire fitz chivaler*, and the like.

(1) See further as to *escheat* and *eschenetor*, ante 13. b. and 18. b. and note 2. there. 1 Inst. 225. Mad. Excheq. chap. 10. f. 2.

(2) [See Note 92.]

31 E. 3. tit. Gager deliverance 5.  
38 E. 3. 1.  
43 Ass. p. 12.  
4 E. 3. ca. 5.  
18 E. 3. ca. 4 & 6.  
4 H. 4. ca. 2.  
2 H. 4. fo. 18.  
See of this in the Chapter of Fee Simple.  
Sect. 4.  
(1 Ro. Abr. 316.  
F. N. B. 144.  
Ante 13. a.)

See more of this in the Chapter of Warrantie, Sect.

W. 1. ca. 33.  
Flet. B. 2. ca. 43.  
& li. 5. ca. 34.  
32 H. 8. ca. 24.  
(F. N. B. 144.)

## Sect. 131.

[93. a.]

**E**T pur ceo que fealtie est incident a tous maners de tenures, forspris le tenure in frankalmoigne, (si come serra dit en le tenure de frankalmoign) et pur ceo que le seignior ne voiloit al commencement del tenure aver aucun auter service forsque fealtie, il est reason, que home poet tener de son seignior per fealtie tantsolement; et quaut il ad fait son fealtie, il ad fait tous ses services.

**A**ND for that fealtie is incident to all manner of tenures, but to the tenure in frankalmoigne (1), (as shall be said in the tenure of frankalmoigne) and for that the lord would not at the beginning of the tenure have any other service but fealty, it is reason, that a man may hold of his lord by fealty onely; and when he hath done his fealty, he hath done all his services.

(14. Co. 2. Post.  
43. a.)

“**F**EALTIE est incident.”

Of incidents there be two sorts, viz. separable, and inseparable.

Separable, as rents incident to reversions, &c. which may be severed: inseparable, as fealty to a reversion or tenure, which cannot be severed: for as all lands and tenements within *England* are holden of some lord or other, and either mediately or immediately of the king; so to every tenure at the least fealty is an inseparable incident, so long as the tenure remains; and all other services, except fealty, are severable. But where the tenure is by fealty only, there is no reliefe due for the cause abovesaid (2).

## Sect. 132.

**I**TEM, si un home lessee a un auter pur terme de vie certaine terres ou tenement, sauns parler de aucun rent render a le lessor, uncore il ferra fealtie a le lessor, pur ceo que il tient de luy. Auxy si un lease soit fait a un home pur terme de ans, il est dit, que le lessee ferra fealtie a le lessor, pur ceo que il tient de luy. Et ceo est prove bien per les parols del brieve de wast, quant le lessor ad cause de porter brieve de wast envers luy; lequel brieve dirra que le lessee tient les tenements de le lessor pur terme de ans. Issint le brieve prova un tenure entre eux. Mes celui, que est tenant a volunt solongue le course del common ley, ne ferra fealtie; pur ceo que il n'ad aucun sure estate. Mes auterment est de tenant a volunt solongue le custome del manor; pur ceo que

**A**LSO, if a man letteth to another lands or tenements for terme of life, without naming any rent to be reserved to the lessor, yet he shall do fealty to the lessor, because he holdeth of him. Also is a lease be made to a man for terme of yeares, it is said, that the lessee shall do fealty to the lessor, because he holdeth of him. And this is well proved by the words of the writ of wast, when the lessor hath cause to bring a writ of wast against him; which writ shall say, that the lessee holds his tenements of the lessor for terme of yeares. So the writ proves a tenure betweene them. But he, which is tenant at will according to the course of the common law, shal not do fealty; because he hath not any sure estate. But otherwise it is of

(1) [See Note 93.]

(2) [See Note 94.]



*que il est oblige pur faire fealtie a son seignior pur deux causes. L'un est per cause del custome; et l'auter est, pur ceo que il prist son estate en tiel forme pur faire a son seignior fealty.*

of tenant at will according to the custom of the manor; for that he is bound to do fealty to his lord for two causes. The one is by reason of the custome; and the other is, for that he taketh his estate in such form to do his lord fealty.

**"SI un home lesee pur terme de vie sauns parler de rent, &c. il ferra fealtie, &c."** And the reason is; because there is a tenure, and fealtie (as hath beene said) is incident to al manner of tenures; and it is to be noted, that the law, for the suretie [93, b.] of the lord, that his tenant shall be faithfull and loyall to him, doth create such a service as the tenant shall be bound thereunto by oath.

V. Sect. 214.  
(Ante 67. a. 68. a.)

**"Auxi si lease soit fait per ans, &c. le lesee ferra fealty."** For there also is a tenure between them. And *Littleton's* opinion in this case is holden for good law at this day (1).

40 E. 3. 34.  
9 H. 6. 41.  
10 H. 6. 13.  
9 E. 4. 1.  
21 E. 4. 29.  
5 H. 6. 12.  
6 H. 7. 11.  
Vid. Sect. 24.

**"Et ceo est prove bien per les parols del brieve, &c."** *Nota*, the original writs are (as it were) the foundations and grounds of the law, and, as it appears here by *Littleton*, are of great authority for the prooffe of the law in particular cases (2).

**"Pur ceo que il n'ad sure estate."** Therefore tenant at will shall not do fealty (as hath been said before); because the matter of an oath must be certaine. The rest of this Section needs no explication (3).

(Ante 63. a.  
5. Co. 10.)

(1) See ante 67. b. note 2.

(3) [See Note 95.]

(2) See ante 73. b.

## CHAP. 6.

## Frankalmoigne.

## Sect. 133.

**T**ENANT en frankalmoigne est, lou un abbe, ou prior, ou un autre home de religion, ou de saint eglise, tient de son seignior en frankalmoigne; que est a dire en Latin, in liberam eleemosynam. Et tiel tenure començoit adeprimes en auncient temps en tiel forme. Quant un home en auncient temps fuit seisie de certain terres ou tenements en son demesne come de fee, et de mesmes les terres ou tenements enfeoffa un abbe et son covent, ou un pryor, &c. a ter et tener a eux et lour successors a tous jours en pure et perpetual almoigne ou en frankalmoigne; [ou per tiels parols, a tener de le grantor, ou de le feoffor, et de ses heires en frankalmoigne :] (1) en tiels cases les tenements sont ienus en frankalmoigne.

**T**ENANT in frankalmoigne is, where an abbot, or prior, or another man of religion, or of holy church holdeth of his lord in frankalmoigne; that is to say in Latine, in liberam eleemosinam, that is, in free almes. And such tenure beganne first in old time. When a man in old time was seised of certain lands or tenements in his demesne as of fee, and of the same land infeoffed an abbot and his covent, or prior and his covent, to have and to hold to them and their successors in pure and perpetuall almes, or in frankalmoigne; or by such words, to hold of the grantor, or of the lessor, and his heires in free almes: in such case the tenements were holden in frankalmoigne.

Bract. lib. 2.  
cap. 5. and lib. 4.  
ca. 2. Britton,  
fo. 164, 166.  
Mirror, ca. 2.  
sect. 16.  
Glanvil. lib. 7.  
ca. 1. and lib. 12.  
ca. 3. & 25.  
Fleta, lib. 3.  
ca. 5. 21 H. 7. 30.  
20 E. 3. 14.  
3 H. 6. 23.  
13 H. 8. 8.  
(4 Co. 104.)

**U**N abbe, prior, ou autre home de religion, ou de saint eglise." It is to be observed, that of ecclesiasticall persons some be regular, and some be secular. They be called regular, because they live under certain rules, and have vowed three things; true obedience, perpetuall chastity, and wilfull poverty. And when a man is professed in any of the orders of religion, he is said to be *home de religion*, a man of religion, or religious. Of this sort be all abbots, priors, and others of any of the said orders regular. Secular are persons ecclesiasticall; but because they live not under certain rules of some of the same orders, nor are votaries, they are for distinction sake called secular, as bishops, deanes, and chap- [94. a.] ters, archdeacons, prebends, parsons, vicars, and such like. All which *Littleton* here includeth under these general words, *de saint eglise*, of holy church; and none of these are in law said to be *homes de religion*, or religious.

Where *Littleton* saith (*infeoffa un abbe et son covent*) his meaning is, that the abbot only is infeoffed: for he is only a person capable, and the covent are dead persons in law, and have power of assent only; and that they thereunto assent. But since *Littleton* wrote, all abbeyes, priories, monasteries, and other religious houses of monks, canons, friers and nuns, &c. have been dissolved, and their possessions given to the crowne (2).

The ecclesiasticall state of *England*, as it standeth at this day, (which is necessary for our student to know) is divided into two provinces,

See the Statutes of 27 H. 8. not printed, but in the abridgment 31. H. 8. cap. 13. and 32 H. 8. ca. 24. &c. Vide Sect. 530. (4 Inst. 321.)

(1) The words between brackets are in L. and M. but not in Roh.

(2) The student will find a good history of

the dissolution of monasteries in England in the excellent preface to that most valuable work the *Notitia Monastica*, by bishop Tanner.

provinces, or archbishopricks, (viz.) of *Canterbury* and of *Yorke*. The archbishop of *Canterbury* is styled *Metropolitanus et Primas totius Angliæ*, and the archbishop of *Yorke* *Primas Angliæ*. Each archbishop hath within his province suffragan bishops of several diocesses (3). The archbishop of *Canterbury* hath under him within his province, of ancient foundations, viz. *Rochester* his principall chaplaine, *London* his deane, *Winchester* his chancellor, *Norwich*, *Lincolne*, *Ely*, *Chichester*, *Salisbury*, *Exeter*, *Bathe* and *Wells*, *Worcester*, *Coventry* and *Litchfield*, *Hereford*, *Landaffe*, *St. David*, *Bangor*, and *St. Assaph*, and four founded by king *Henry 8.* erected out of the ruins of dissolved monasteries (that is to say) *Gloucester*, *Bristol*, *Peterborow* and *Oxford*. The archbishop of *Yorke* hath under him four, (viz.) the bishop of the county palatine of *Chester*, newly erected by king *Henry 8.* and annexed by him to the archbishopricke of *Yorke*, of the county palatine of *Durham*, *Carlisle*, and the isle of *Man*, annexed to the province of *Yorke* by *H. 8.* but a greater number this archbishop anciently had, which time hath taken from him. The extent of every diocesse you may elsewhere read, the which for brevity I here omit. All the said archbishopricks and bishopricks of *England* were founded by the kings of *England*, to hold by barony, as hereafter shall be said (4). \* And every archbishop and bishop hath his deane and chapter, whereof more shall be said hereafter. The archbishop of *Canterbury* hath the precedence, next to him the archbishop of *Yorke*, next to him the bishop of *London*, and next to him the bishop of *Winchester* (5), and then all other bishops of both provinces after their ancientnesse.

Every diocesse is divided into archdeaconries, whereof there be 60; and the archdeacon is called *oculus episcopi*; and every archdeaconry is parted into deanries; and deanries again into parishes, townes and hamlets. And thus much, for the better understanding of our author, and how the state ecclesiasticall standeth at this day, shall suffice.

“*Frankalmoigne, que est a dire en Latin, in liberam eleemosinam,*” in *English*, in free almes. There is an officer in the king’s house called *eleemosinarius*, vulgarly called the king’s almner (whose office and duty is excellently described in ancient authors), viz. *Fragmenta diligenter colligere et diligenter distribuere singulis diebus egenis; egrotos et leprosos, incarceratos, pauperesque viduas, et alios egenos vagosque in patriâ commorantes charitativè visitare: item equos relictos, robas, pecuniam, et alia ad eleemosinam largita recipere, et fideliter distribuere. Debet etiam regem super eleemosina largitione, crebris summonitionibus stimulare, præcipuè diebus sanctorum, et rogare ne robas suas, quæ magni sunt pretii, histrionibus, blanditoriibus, accusatoribus, seu menistrallis, sed ad eleemosina sua incrementum, jubeat largiri* (6).

All ecclesiasticall persons may hold in frankalmoign, be they secular or regular; and no lay person can hold in frankalmoign. This adjective (*liber*) doth distinguish many things in law from others; as here, *libera eleemosina* are words appropriated to this case, and do distinguish it from a tenure by divine service; *librum tenementum*,

[94. b.] from a tenure in villenage, by copyhold or base tenure; *liberum*

Matth. Parker do viti archiepiscoporum. Lindwood. Camden Britannia. Vid. Rot. Esavian. anno 36 H. 8. 1 E. 6. 5 H. 6. 8cc. Westminster also was newly erected a bishopricke by H. 8. but by queene Mary it was restored to be an abbey, and by queene Eliz. created a deanry collegiate. Chester had been anciently a bishop’s see, and long since translated to Coventry. 33 H. 8. ca. 31. Camden ubi supra. 30 H. 8. first fruits and tenths. Vid. Sect. 137. 3. Co. 73. deane and chap. of Norwich case. Vide Sect. 134. 201. 31 H. 8. cap. 10.

Vide more hereof, Sect. 186. 528. 648. 8cc.

Fleta, lib. 2. cap. 33.

Vide Sect. 1. Bract. l. 4. c. 37. 38. Britton, cap. 33.

(3) [See Note 96.]

(4) See ante 70. b. note 2. post. 104. a.

(5) [See Note 97.]

(6) [See Note 98.]

Britton, cap. 66.  
Braet. lib. 4.  
F. N. B. 180.  
Braet. lib. 4.  
fo. 288, 247, 302.  
Brit. fol. 245.  
Fleta, lib. 5. cap.  
11. Fortescue,  
c. 26. 24 E. 3. 34.  
43 E. 3. Conspir.  
11. 27. Ann. 50.  
Stamf. 178. Vide  
Sect. 100. Fleta,  
lib. 1. cap. 47.

*liberum feodum*, franke fee, from a tenure in ancient demeane; *liberum maritagium*, from other estates taile; *libera firma*, frank ferme, when an estate is changed from knights service to socage; *liberum socugium*, from a tenure by service in chivalrie; *francus bancus*, to distinguish it from other dowers, for that it cometh freely without any act of the husband's or assignement of the heire; *libera lex*, to distinguish men who enjoy it, and whose best and freest birth-right it is, from them that by their offences have lost it, as men attainted in an attain, in a conspiracie upon an indictment, or in a *fraternire*, &c. and soof *libera capella*, *francus flegius* frankpledge, *libera chusea* free chase, *liber burgus*, *liber asper*, *liber taurus*, and the like. But in a matter (some will say) of curiosity, this shall suffice; and yet seeing it tends to the better understanding (others say) it is tolerable.

Glanvil lib. 7.  
ca. 1. fo. 44,  
45. acc.

By the ancient common law of *England*, a man could not alien such lands as he had by descent, without the consent of his heire; (1) yet he might give a part to God in free almoigne, or with his daughter in free marriage, or to his servant in *remuneratione servitii*. Our old bookes described frankalmoign thus; when lands or tenements were bestowed upon God, (that is) given to such people as are consecrated to the service of God. In our ancient bookes these gifts of devotion were called Churchset, or Churchseed, *quasi semen ecclesie*; but in a more particular sense it is described thus: *Certam mensuram bladi tritici significat, quam quilibet olim sancte ecclesie die sancti Martini, tempore tam Britonum quam Anglorum, contribuerunt. Plures tamen magnates, post Romanorum adventum, illam contributionem secundum veterem legem Moisis nomine primitiarum dabant, prout in brevi regis Knuti ad summum pontificem transmissa continetur, in quo illam contributionem Churchsed affellant, quasi semen ecclesie.*

Britton, ca. 66.  
fol. 104. Braet.  
lib. 2. ca. 5 &  
10. F. N. B. 211.

Fleta, lib. 1.  
cap. 43.

"*Et tiel tenure.*" For albeit neither fealty, nor any other temporall service, is due, yet it is a tenure.

7 E. 4. 12.  
33 H. 6. 6, 7.  
39 H. 6. 20.  
[a] Mortmaine.  
Britton, fol. 38.  
& 90. Braetom,  
lib. 2. cap. 5.  
Fleta, lib. 3. cap.  
5. 11 H. 7. 12.  
(2. Ro. Abr. 61.)

"*En ancient temps.*" [a] That is to say, before the statutes of mortmaine, viz. *Magna Charta*, cap. 36. and 7 E. 1. *de religiosis*, &c. and before the statute of *quia emptores terrarum*, as shall be hereafter in his proper place said in this chapter (2).

39 H. 6. 30. b.

"*Enfeoffa un abbe et son covent, &c.*" Albeit the covent be dead persons in law, and the abbot only capable (as before is said), yet if the feoffment be made to an abbot and covent, the feoffment is good, and the state vesteth only in the abbot. And note a man may infeoffe an abbot, a bishop, a parson, &c. or any other sole body politique, by deed or without deed, in free almes; and so may a gift in frankmariage be made without deed also; but if lands be given to a deane and chapter, or any other corporation aggregate of many, there the gift must be by deed (3).

(1. Ro. Abr. 832.)

"*A aver et tener a eux et a lour successors.*" For in case of an abbot or prior and covent regularly a fee simple doth not passe without this word (successors); (4) for the diversity standeth thus betwene a corporation aggregate of many capable persons, and a sole corporation. As if lands be given to a deane and chapter, they have

Vid. Litt. in the  
Chapter of Fee  
simple, Sect. 1, 2.

(1) See Wright's Ten. 167.

(2) See post. Sect. 140.

(3) [See Note 99.]

(4) [See Note 100.]

have a fee simple without this word (successors,) for that the body never dies ; but if lands be given to a bishop, parson, or any other sole corporation, who after their deceases have a succession, there without this word (successors) nothing passeth unto them but for life (5). But of corporations aggregate of many, there is a diversity when the head and body both are capable, as in the case of deane and chapter, and when one (as hath been said) is onely capable, as in case of abbot or prior and convent ; but yet out of the generall rules, the case of frankalmoign is excepted, as hereafter shall be said. Also lands must be given to a corporation aggregate of many by deed ; but to a sole corporation it may be granted without deed.

*Bracton, lib. 2. cap. 10. Potest donatio fieri in liberam elemosinam ecclesiis cathedralibus, conventualibus, parochialibus, et viris religiosiis.*

“ *En fure et perhetuall almoigne.*” Here it appeareth, that a tenure in frankalmoigne may be created without this word (*libera*), for *fura* implyeth as much.

“ *Ou en frankalmoigne.*” But one of these words, either *fura* or *libera*, must be used, or else it is no tenure in frankalmoigne.

“ *Ou per ceux parolz, a tener de le grantor ou feoffor et ses heires en frankalmoigne.*” Here it appeareth, that by these words a fee simple passeth without this word (successors), albeit it be in case of a sole corporation. For as in case of a gift in frankmarriage, an estate taile passeth to the donees without the words (of the heires of their two bodies) as hath beene said in the Chapter of Fee taile ; so in case of a gift in frankalmoigne (which may be resembled to a divine marriage), a fee simple passeth, as hath bin said, though it be in case of a sole corporation, without this word (successors). And besides, grants in frankalmoigne are ancient grants, as hath beene said, and therefore shall be allowed, as the law was taken, when such grants were made.

39 H. 6. 30.

35 H. 6. 56.  
7 E. 4. 11.  
Vid. Bract. lib.  
2. ca. 10.

35 H. 6. 56.  
7 E. 4. 11.  
Bract. ubi supra.  
44 E. 3. 24.

20 H. 6. fol. 30.

33 E. 3. 4. a.  
14 H. 6. 12.  
10 H. 7. 13.  
16 H. 7. 9.  
18 E. 3. Conusans  
39. 33 H. 6. 22.  
6 E. 3. 64. &c.  
Tr. J. H. 3. Rot.  
4 in Scaccario.  
The prior of Dunstable's case.

[95. a.]

Sect. 134.

**E***N mesme le manner est, lout terres ou tenements fueront grant en ancien temps a un deane et chapter et a lour successors, ou a un parson d'un esglis et a ses successors, ou a aucun auter home de saint esglis et a ses successors, en frankalmoigne, si il avoit capacity d'apprender tiels grants ou feoffments, &c.*

**I***N the same manner it is, where lands or tenements were granted in ancient time to a deane and chapter and to their successors, or to a parson of a church and his successors, or to any other man of holy church and to his successors, in frankalmoigne, if he had capacity to take such graunts or feoffments, &c.*

“ *E**N mesme le manner, &c.*” Here *Littleton* having put an example of bodies incorporate, aggregate of many, whereof the head is only capable, now putteth examples both of bodies incorporate

(5) [See Note 101.]

rate aggregate of many (all being capable) and of sole corporations of secular persons.

"*Deane.*" *Decanus*, is derived of the *Greek* word *Δεκα*, that signifieth Ten, for that he is an ecclesiasticall secular governour, and was anciently over ten prebends, or canons at least in a cathedral church, and is head of his chapter (1).

(3 Co. 73.)

"*Chapter, Capitulum, est clericorum congregatio sub uno decano in ecclesiâ cathedrali* (2)." And chapters be twofold, viz. the ancient and the later. And the later be also of two sorts. First, those which were translated or founded by king *Henry* the eight, in place of abbots and covents, or priors and covents, which were chapters whiles they stood; and these are new chapters to old bishopricks. Secondly, where the bishopricke was newly founded by *Henry* the eight (as *Chester, Bristol, &c.*) there the chapters are also new (3). There is a great diversitie betweene the commings in of the ancient deanes and of the new. For the ancient come in, in much like sort as bishops doe; for they are chosen by the chapter, by a *conge de eslier*, as bishops be, and the king giving his royall assent they are confirmed by the bishop. But they which are either newly translated or founded, are donative, and by the king's letters patents are installed, which are matters necessarie to be knowne (4).

"*S'il avoit capacite a prendre.*" For ecclesiasticall persons have not capacite to take in succession, unlesse they be bodies politique; as bishops, archdeacons, deanes, parsons, vicars, &c. or lawfully incorporate by the king's letters patents, or prescription; as deanes and chapters, colledges, &c. But a colledge of religious persons, chauntry priests, and such like, that are not lawfully incorporated, but onely consist in vulgar reputation, have no capacity to take in succession. Therefore *Littleton* added materially (*s'il ad capacite a prendre.*)

### Sect. 135.

**E**T tiels, que teignent en frankalmoigne, sont obligé de droit devant Dieu de faire orisons, prières, messes, et autres divines services, pour les âmes de leur grantor ou feoffor, et pour les âmes de leur heires queux sont mortes, et pour le prosperité et bon vie et bon salut de leur heires que sont en vie. Et pour ceo ils ne feront a nul temps aucun feallie a leur seignior; pour ceo que tiel divine service est meilleur pour eux devant Dieu, que aucun feallants de feallie; et ainsi pour ceo que ceux parloir (frankalmoigne) exclude le seignior d'avoir aucun terrein ou

**A**ND they, which hold in frankalmoigne, are bound of right before God to make orisons, prayers, masses, and other divine services, for the soules of their grantor or feoffor, and for the soules of their heires which are dead, and for the prosperity and good life and good health of their heires which are alive. And therefore they shall do no fealty to their lord; because that this divine service is better for them before God, then any doing of fealty; and also because that these words (frankalmoigne) exclude the lord to have any

(1) [See Note 102.]

(2) [See Note 103.]

(3) [See Note 104.]

(4) [See Note 105.]

*ou temporall service, mes d'aver tantsolement divine et spirituall service d'estre fait pur luy, &c.* any earthly or temporal service, but to have onely divine and spirituall service to be done for him, &c.

**I**N this Section there appeareth a division of tenures, that is to say, some be spirituall, and some be temporall. And of spirituall some be incertaine, as tenures in frankalmoign; and some be certain, as tenures by divine service. Again, divine service certaine is two-fold; either spirituall, as prayers to God; or temporall, as distribution of almes to poore people.

[95. b.] "*Oblige de droit.*" That is, they are compellable by the ecclesiasticall law to doe it; and therefore it is said that they are bound of right, (for want of remedy and want of right is all one) and the common law (as here it appeareth) taketh knowledge of the ecclesiasticall law in that behalfe.

"*De faire orisons, prayers, messes, et autres divine services.*"

Since *Littleton* wrote, the lyturgie or booke of Common Praier and of celebrating divine service is altered. This alteration notwithstanding, yet the tenure in frankalmoigne remaineth; and such prayers and divine service shall be said and celebrated, as now is authorized; yea, though the tenure be in particular, as *Littleton* [a] hereafter saith, viz. *à chaunter un messe, &c. ou à chaunter un placebo et dirige*, yet if the tenant saith the praier now authorised, it sufficeth. And as *Littleton* [b] hath said before in the case of so-cage, the changing of one kinde of temporall services into other temporall services altereth neither the name nor the effect of the tenure; so the changing of spirituall services into other spirituall services altereth neither the name nor effect of the tenure. And albeit the tenure in frankalmoigne is now reduced to a certaintie contained in the booke of Common Prayer, yet seeing the originall tenure was in frankalmoigne, and the change is by generall consent by authority of parliament, [c] whereunto every man is party, the tenure remaines as it was before.

[a] Vide Sect. 137.

[b] Vide Sect. 119.

[c] 2 E. 6. c. 1.  
5 & 6 E. 6. cap. 1.  
1 Eliz. ca. 2.

"*Ne feront aucun fealtie.*" Herein tenant in frankalmoigne differeth from a tenant in frankmariage; for tenant in frankmariage shall doe fealty, as hath beene said in the Chapter of Fee taile, but tenant in frankalmoigne shall not doe any, or any other thing, but *devota animarum suffragia*.

"*Tiel divine service est meilleur per euz.*" And it is also said in our bookes [d], *que frankalmoigne est le plus haute service*; and this was confessed by the heathen poet:

[d] 33 H. 6. 6.  
15 E. 1. tit.  
Count de  
Voucher 118.

— *fuit hæc sapientia quondam*  
*Publica privatis secernere, sacra profanis.*

And certaine it is, that *nunquam res humana prosperè succedunt, ubi negliguntur divinæ.*

## Sect. 136.

**E**T si tiels, que teignent lour tenements en frankalmoigne, ne voient ou failent de faire tiel divine service (come est dit) le seignior ne poit euz distraire pur cel non fesant, &c. pur ceo que n'est mis en certuine queux services ils doivent faire. Mes le seignior de ceo poit complaine a lour ordinary ou visitour, luy preyant, que il voiloit mitter punishment et correction de ceo, et auxy de provider que tiel negligence ne soit plus avant fait, &c. Et l'ordinary ou visitour de droit ceo doit faire, &c.

**A**ND if they, which hold their tenements in frankalmoign, will not or faile to do such divine service (as is said) the lord may not distraine them for not doing this, &c. because it is not put in certainty what services they ought to do. But the lord may complaine of this to their ordinary or visitour, praying him, that he will lay some punishment and correction for this, and also provide that such negligence be no more done, &c. And the ordinary or visitor of right ought to doe this, &c.

“**L**E seignior ne poit euz distraire pur c'est non fesant, &c.”

“*Distreine.*” The word distresse is a French word. In Latine it is called *districcio, sive angustia*; because the cat-[96. a.] tell distrained are put into a strait, which we call a pown.

“*Pur ceo que n'est mise en certuine queux services ils doivent faire.*” It is a maxim in law, that no distresse can be taken for any services that are not put into certainty, [e] nor can be reduced to any certainty; for, *id certum est, quod certum reddi potest*; for [f] *oportet quod certa res deducatur in iudicium*: and upon the avowry, damages cannot be recovered for that which neither hath certainty, nor can be reduced to any certainty. And yet in some cases there may be a certainty in uncertainty; as a man may hold of his lord to sheere all the sheepe depasturing within the lord's manor; and this is certaine enough, albeit the lord hath sometime a greater number, and sometime a lesser number there; and yet this uncertainty, being referred to the manor which is certaine, the lord may distrain for this uncertainty. *Et sic de similibus.*

(1. Co. 73. a.)

“*Poit complainer.*” That is, to complain in course of justice, according to the ecclesiasticall law.

[g] Mirror, ca. 5. sect. Bracton, lib. 5. fo. 404. &c.  
Fleta, lib. 2. ca. 50. & 55. lib. 6. ca. 38.  
Bracton, fo. 69.  
70 W. 2. ca. 19.  
17 F. 2. Bro.  
333 Regist. 141.  
Lindwood, tit. de Consec. cap. extor.  
Bracton, lib. 2. ca. 2. fo. 466. & 467, and the other authors above said.  
(Post. 344. 9. Co. 36. 2. Inst. 396.)

“*A lour ordinare.*” *Ordinarius*; and so he is called [g] in the ecclesiasticall law, *quia habet ordinarium iurisdictionem in iure proprio, et non per deputationem*. The name we have anciently taken from the canonists, and doe apply it onely to a bishop, or any other that hath ordinary jurisdiction in causes ecclesiasticall. In this case of *Littleton* it is to be observed, that the law doth appoint every thing to be done by those, unto whose office it properly appertaineth; and forasmuch as it belongeth to the office of the ordinary in this case to see divine service said, and to compell them to doe it by ecclesiasticall censures, therefore complaint is to be made unto him. Here and in the next Section it appeareth, that for deciding of controver-

sies,



sies, and for distribution of justice within this realm, there be two distinct jurisdictions; the one ecclesiasticall, limited to certaine spirituall and particular cases (of the one whereof our author here speaketh); and the court wherein these causes are handled, is called *forum ecclesiasticum*. The other jurisdiction is secular and generall, for that it is guided by the common and generall law of the realme, *que pertinet ad coronam et dignitatem regis, et ad regnum in causis et placitis rerum temporalium, in foro seculari*. So as in this case put by our author, the lord hath remedy for his divine service (albeit they issue out of temporall lands) in *foro ecclesiastico*, by the ecclesiasticall law; otherwise the lord should be without remedy. Yet the common law, to the intent that ecclesiasticall persons might the better discharge their duty in celebration of divine service, and not be intangled with temporall businesse, hath provided, that if any of them be chosen to any temporall office, he may have his writ *de clerico infra sacros ordines constituto non eligendo in officium*, &c. and thereof be discharged.

Regist. Orig. 187.

"*Ou visitor.*" That is, where the king or any of his progenitors is founder of the house, there the ordinary regularly shall not visit them, but the chancellour of *England* is appointed by law to be visitor of them; or where a speciall visitor is appointed upon the foundation, the complaint must be made to that visitor.

27 E. 3. 84. 85.  
Regist. 40.  
F. N. B. 43.  
10 Ellis. Dier.  
273. 16 E. 3.  
Bre. 660.  
21 E. 3. 60.  
6 H. 7. 13.  
2. Ass. 29.  
Brooke tit.  
Fremantle 21.

"*De droit doit ceo faire.*" *De droit*, of right, (that is to say) he ought to doe it by the ecclesiasticall law in the right of his office.

And here is implied a maxime of the common law, that where the right (as our author here speaketh) is spirituall, and the remedy thereof onely by the ecclesiasticall law, the consusans thereof doth appertaine to the ecclesiasticall court.

(5. Co. 66. b.  
2. Co. 43.  
Plowd. 277.

[96. b.]

Sect. 137.

**M**ES si un abbe, ou prior, tient de son seignior per certaine divine service, en certaine d'estre fait, sicome a chaunter un messe chescun Vendredie en le semaine pur les almes, ut supra, ou chescun an a tiel jour a chaunter placebo et dirige, &c. ou de trover un chapleine de chanter messe, &c. ou de distributer en almoigne ul cent poovres homes cent deniers a tiel jour; en tiel case, si tiel divine service ne soit fayt, le seignior poet distreyner, &c. pur ceo que le divine service est mise en certaine per lour tenure, que le abbe ou prior devoit faire. Et en tiel case le seignior avera fealtie, &c. come il semble. Et tiel tenure n'est passe dit tenure en frankalmoigne, cins est dit tenure per divine service. Car en tenure en frankalmoigne nul mention est

**B**UT if an abbot, or prior, holds of his lord by a certaine divine service, in certaine to be done, as to sing a masse everie Friday in the weeke, for the soules, ut supra, or every yeare at such a day to sing a placebo et dirige, &c. or to finde a chaplain to sing a masse, &c. or to distribute in almes to an hundred poore men an hundred pence at such a day; in this case, if such divine service be not done, the lord may distreine, &c. because the divine service is put in certaine by their tenure, which the abbot or prior ought to doe. And in this case the lord shall have fealty, &c. as it seemeth. And such tenure shall not be said to be tenure in frankalmoigne, but is called tenure by

*est fait d'ascun manner de service ; car nul poet tener en frankalmoigne, si soit expresse ascun manner de certain service que il doit faire, &c.*

by divine service. For in tenure in frankalmoigne no mention is made of any manner of service; for none can hold in frankalmoigne, if there be expressed any manner of certaine service that he ought to doe, &c.

2 E. 3. 27, 28.

**"PER** certaine divine service d'estre fait, sicome a chaunter un messe, &c. ou de distributer en almoign, &c." Here be the two parts above mentioned, of divine service; and for this divine service certaine, the lord hath his remedy, as here it appeares by our author, in *foro seculari*: for here it appears, that if the lord distreine for not doing of divine service, which is certaine, he shall upon his avowry recover damages at the common law, that is, in the king's temporal court, for the not doing of it. And if issue be taken upon the performance of the divine service, it shall be tried by a jury of twelve men; because albeit the service be spirituall, yet the damages are temporall, and so is the seigniorie also.

(2. Co. 78. b.  
F. N. B. 209. L.)

38 H. 6. 26, 27.

2 E. 6. ca. 13.  
versus finem.  
13 E. 3. ca. 5.  
11 H. 7. c. 8.  
1 El. ca. 2.  
13 El. ca. 1.  
23 El. ca. 1.  
1 Ja. c. 11. & 12:

And here is implied another maxime of the law, that where the common or statute law giveth remedy in *foro seculari*, (whether the matter be temporall or spirkuall) the consens of that cause (4. Co. 20.) belonging to the king's temporall courts onely; unlesse the jurisdiction of the ecclesiasticall court be saved or allowed by the same statute, to proceed according to the ecclesiasticall lawes.

(4. Co. 20.)

**"Ou de distributer en almoigne al cent povres homes."** Here note, that the almes and reliefe of poor people, being a work of charity, is accounted in law divine service; for what herein is done to the poore for God's sake, is done to God himselfe.

**"Poet distreiner, &c."** Here (&c.) includeth many excellent things, as when, where, and what may be distreyned, of [97. a.] all which there is a taste given in their proper places.

**"En tiel case le seignior avera fealite, &c. come semble."** For, as it hath beene said, fealty is incident to every tenure, saving the tenure in frankalmoigne, and where the lord may distreine, there is fealty due. And Britton calleth this tenure (by divine service) *aumone*, and not *libera eleemosina*. And, saith he, *tenure en aumone est terre ou tenement que est done a aumone, dount ascun service est retenue al feoffor*.

Brit. fo. 164.

**"&c."** And here (&c.) implyeth distresse, escheat, and the like.

33 H. 6. fol. 6.  
Brit. ca. 66.

**"Et tiel tenure n'est pas dit tenure en frankalmoigne, eins est dit tenure per divine service, &c."** And therefore our old bookes divided spirituall service into free almes (which was free from any limitation of certainty) and almes, because the tenants were bound to certaine divine services.

(2. Inst. 460.)  
13 E. 1. Count  
de Vouch. 118.

**"S'il soit expresse ascun manner de certaine service."** This holdeth where the certainty is reserved upon the original grant. If lands were given to hold in *liberâ eleemosinâ, reddendo* a rent, it seemeth the reservation of the rent to be void, \* because it is repugnant and contrary to the former grant in *liberâ eleemosinâ*.

\* 13 H. 4. tit.  
Meme 74.  
30 E. 3. 30.  
19 E. 2.  
Avowrie 224.  
50. Ass. pl. 6.

33 E. 1. Taille 31. 26. Ass. 66. 4 H. 6. 17. Trin. 4 E. 3. F. N. B. 262. C. 15 E. 3. Corody 4. 11. Ass. 22.

*Vide Trin. 4 E. 3. and F. N. B. 231. f.* that an abbot or prior that hold in frankalmoigne shall not be charged with a corody. Also lands holden in frankalmoigne cannot [?] be ancient demesne, in respect of charges incident thereunto.

[?] 32 E. 1.  
Ant. Dem. 32.  
8 E. 2. 4.

"*Que il doit faire, &c.*" Here by (*&c.*) is understood temporall or spirituall service also, which he ought to doe corporally, or render, or pay.

There were within this realme of *Englande* one hundred and eightene monasteries, founded by the kings of *Englande*; whereof such abbots and priors as were founded to hold of the king *per baroniam*, and were called to the parliament by writ, were lords of parliament, and had places and voices there. \*And of them there were twenty-seven abbots and two priors, as by the rolles of parliament appeares. But since our author wrote, all these (as hath beene said) (1) are dissolved. King *Stephen* did found the abbey of *Feverham*, in Kent, *et dedit abbati et monachis, et successoribus suis, manerium de Feverham in com. Kancie, simul cum hundredo, &c. tenendum per baroniam, &c.* who albeit he held by a barony, yet because he was never (that I [m] finde) called by writ, he never sate in parliament.

[F. N. B. 232. a.]  
\* Per example,  
Rot. Parl.  
8 E. 6. 2.  
21 E. 2. 4. 2.

All the archbishops and bishops of *England* have beene founded by the kings of *England*, and doe hold of the king by barony (as before hath beene said), (2) and have beene all called by writ to the court of parliament, and are lords of parliament. As (amongst many) take one notable record: [o] *Mandatum est omnibus episcopis, qui conventuri sunt apud Gloucestriam, die Sabbati in crastin. sancte Katharine, firmiter inhibendo, quod sicut baronias suas, quas de rege tenent, diligant, nullo modo presumant consilium tenere de aliquibus que ad coronam regis pertinent, vel que personam regis, vel statum suum, vel statum consilii sui contingunt, scituri pro certo, quod si fecerint, rex inde se capiet ad baronias suas. Teste rege apud Hereford, 23 Novemb. &c.* And the bishopricks in *Wales* were founded by the princes of *Wales*; and the principality of *Wales* was holden of the king of *England*, as of his crowne; and when the prince of *Wales* committed treason, rebellion, &c. the principality was forfeited, and the patronages of the bishops annexed to the crowne of *England*, so as the king is to have pensions for his chaplaines, and corodies for his vadelets, of them, as of bishops founded by himselfe (3). And *vide Mich. 10 H. 4. Rot. 60. Wallia coram rege*, that the judgment was given accordingly against the bishop of *St. David's* in *Wales*, *per justiciarios de utroque banco et alios de merito consilio domini regis*. And the bishops of *Wales* are also called by writ to parliament, and are lords of parliament, as bishops of *England* be.

[m] Cane. Pns.  
30 E. 1. coram  
rege this foundation  
is so pleaded.  
(Post. 134. a.  
344. a.)

[o] Ez. rot. par. de  
anno 14. E. 3. m. 17.

10 E. 4. 2. 6. b.

(1) See ante 94. a.

(2) See ante 70. b. and note 2. there.

(3) [See Note 106.]

## Sect. 138.

**I**TEM, si soit demande, si tenant en frankmariage ferra fealtie a le donor ou a ses heirs devant le quart degree passe, &c. Il semble que cy. Car il n'est pas semble quant a cel entent a tenant en frankalmoigne; pur ceo que tenant en frankalmoigne ferra per cause de son tenure divine service par son seignior, come devant est dit; et ceo il est charge a faire per la ley del saint agline, et pur ceo il est excuse et discharge de fealtie: mes tenant en frankmariage ne ferra pur son tenure tel service; si s'il ne ferra fealtie, dunque il ne ferra a son seignior aucun manner de service, ne spirituall ne temporal, lequel serroit inconvenient et encounter reason, que home serrra tenant d'estate d'enheritance a un auler, et encore le seignior avra nul manner de service de luy. (1) Et issint il semble que il ferra fealtie a son seignior devant le quart degree passe. Et quant il ad fait fealty, il ad fait tous ses services.

**A**LSO, if it be demanded, if tenant in frankmariage shall do fealty to the donor or his heirs before the fourth degree be past, &c. it seemeth that he shall. For he is not like as to this purpose to tenant in frankalmoign; for tenant in frankalmoign by reason of his tenure shall do divine service for his lord, as is said before; and this he is charged to do by the law of holy church, and therefore he is excused and discharged of fealty: but tenant in frankmariage shall not do for his tenure such service; and if he doth not fealty, he shal not do any manner of service to his lord, neither spiritual nor temporal, which would be inconvenient, and against reason, that a man shall be tenant of an estate of inheritance to another, and yet the lord shall have no manner of service of him. And so it comes he shall do fealty to his lord before the fourth degree be past. And when he hath done fealty, he hath done all his services.

V. Sect. 67. 136:  
201. 265. 440.  
476. 669. 725.  
46. An. 27.

Littleton fo. 50. b.  
49 E. 3. 6.  
20 E. 3. 395.  
20 H. 6. 29.

(Anno 23. a.)

**“LEQUEL** serrra inconvenient, &c.” An argument drawne from an inconvenience is forcible in law, as hath bene observed before, and shall be often hereafter. *Nulli [97. b.] quod est inconveniens, est licitum.* And the law, that is the perfection of reason, cannot suffer any thing that is inconvenient.

It is better, saith the law, to suffer a mischief that is peculiar to one, then an inconvenience that may prejudice many. See more of this after in this Chapter.

Note, the reason of this diversitie betweene frankalmoigne and frankmariage, standeth upon a maine maxime of law, that there is no land that is not holden by some service spirituall or temporal; and therefore the donee in frankmariage shall doe fealty, for otherwise he should doe to his lord no service at all; and yet it is frankmariage, because the law createth the service of fealty for necessity of reason, and avoiding of an inconvenience. But tenant in frankalmoigne doth spirituall and divine service, which is within the said maxime, and therefore the law will not cohort him to do any temporal service. See the next Section.

*“Et encounter reason.”* And this is another strong argument in law, *Nihil quod est contra rationem est licitum*; for reason is the life of the

(1) Come il semble, L. and M.

the law, say the common law itselfe is nothing else but reason; which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, and not of every man's naturall reason; for, *Nemo nascitur artifex*. This legall reason *est summa ratio*. And therefore if all the reason that is dispersed into so many severall heads, were united into one, yet could he not make such a law as the law in *England* is; because by many successions of ages it hath bene fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this realme, as the old rule may be justly verified of it, *Neminem oportet esse sapientiores legibus*: no man, out of his owne private reason, ought to be wiser than the law, which is the perfection of reason.

[98. a.]

Sect. 139.

**E**T si un abbe tient de son seignior en frankalmoigne, et l'abbe et le convent couch leur common seale alien meemes les tenements a un seculer home en fee simple, en eeo cas le seculer home ferra fealtie a le seignior; pur ceo que il ne poit tener de son seignior en frankalmoigne. Car si le seignior ne doit aver, de luy fealtie, dunque il avera nul manner de service, que serroit inconvenient, ou il est seignior, et le tenement est tenu de luy.

**A**ND if an abbat holdeth of his lord in frankalmoigne, and the abbot and convent under their common seale alien the same tenements to a secular man in fee simple, in this case the secular man shall doe fealty to the lord; because he cannot hold of his lord in frankalmoigne. For if the lord should not have fealty of him, he should have no manner of service, which should be inconvenient, where he is lord, and the tenements be holden of him.

**T**HIS case is worthy of great observation; for hereby it appeareth, that albeit the alienors held not by fealty nor any other terrene service, but only by spirituall services, and those incertaine, yet the alienee shall hold by the certaine service of fealty, (and of this opinion is *Littleton*, agreeable with our bookes in former authorities) for the law createth a new temporall service out of the land to be done by the alienee, wherewith the abbot was not formerly charged, for the avoyding of an inconvenience, viz. that the feoffee should do no manner of service, and consequently that the land should be holden of no man. Wherein it is to be remembered, that (as hath bin said before) all the lands and tenements in *England*, in the hands of any subject, are holden of some lord or other, and that every tenant must do some kinde of service; and that all lands and tenements are holden either mediately or immediately of the king, for originally all lands and tenements were derived from the crown. And it is to be observed, that when the law createth any new tenure, it is the lowest, (viz. tenure in socage) and with the least service that can be done, and nearest to the freedome of the former service: as in this case a tenure in socage by fealty only is created by the law, which is the lowest and least service the law can create, because fealty is incident to every tenure except tenure in frankalmoigne; for if it should create any other service, it must create fealty also. And the law, according to equity and justice

31 E. 3. Comarjit  
22. 33 E. 6. 6.  
31 E. 4. 11.  
9 Co. 123.  
Ant. Law. 1099.  
(2 Inst. 202.  
9 Co. 2. 6.)

(Ante 1. 3. Inst.  
301.)

9 Co. 123. in  
Ant. Lowe's  
case.

28 Apr. Pl. C.  
Bridges, 124. b.

justice, giveth this fealty to the lord, of whom the land was before holden in frankalmoigne. And lastly, the law so abhorreth an inconvenience, as that it createth out of the land a new service for avoyding thereof. It appeareth by our bookes, that a seigniori in frankalmoigne may be granted over, and consequently the tenant shall hold of the grantee by fealty only; and therefore *Britton* said well, that no service could be demanded of a tenant in frankalmoigne, *tant come les terres remaine en les maines les scoffees.*

## Sect. 140.

**I**TEM, si home graunta a cel jour a un abbe, ou a un prior, terres ou tenements en frankalmoigne, ceux parolx (frankalmoigne) sont voides; par ceo que il est ordene per le statute que est appelle quia emptores terrarum (quel estatute fuit fait anno 18 Ed. 1.) que nul poit aliener ne granter terres ou tenements en fee simple a tener de luy meisme. Mais si home seisie de certaine tenements, queux il tient de son seignior per service de chevalier, et a cel jour il, &c. granta per licence mesmes les tenements a un abbe, &c. en frankalmoigne, l'abbe tiendra immediatment mesmes les tenements per service de chevalier de meisme le seignior de que son grantor tenoit, et ne tiendra my de son grantor en frankalmoigne, per cause de meisme le statute. Mais que nul poit tener en frankalmoigne, si non que soit per title de prescription, ou per force de grant fait a aucun de ses predecessors devant que meisme le statute fuit fait. Mais le roy poit doner terres ou tenements en fee simple a tener en frankalmoigne, ou per autres services; car il est hors de cas del estatute.

**A**LSO, if a man grant at this day to an abbot, or to a prior, lands or tenements in frankalmoigne, these words (frankalmoigne) are void; for it is ordained by the statute which is called quia emptores terrarum, (which was made anno 18 E. 1.) that none may alien nor grant lands or tenements in fee simple to hold of himselfe. So that if a man seised of certaine tenements, which he holdeth of his lord by knights service, and at this day he, &c. granteth by licence the same tenements to an abbot, &c. in frankalmoigne, the abbot shall hold immediately the tenements by knights service of the same lord of whom his grantor held, and shall not hold of his grantor in frankalmoigne, by reason of the same statute. So that none can hold in frankalmoigne, unlesse it be by title of prescription, or by force of a grant made to any of his predecessours before the same statute was made. But the king may give lands or tenements in fee simple to hold in frankalmoigne, or by other services; for he is out of the case of that statute.

Vol. 2. Co. the  
Bridges's case.

**O**RDEINE per le estatute." Here it appeareth by the authority of *Littleton*, that this is a statute, and yet the king alone speaketh, viz. *Dominus rex in parlamento suo, &c. ad instantiam magnatum regni sui concessit, providit et statuit.* But because it is *Dominus rex in parlamento, &c. concessit*, [98. b.] it is as much in this case (being an ancient statute) as *dominus rex autoritate parlamenti concessit*. Secondly, it is, (amongst other acts of parliament) entred into the parliament roll, and therefore shall be intended to be ordayned by the king, by the consent of the lords and commons in that parliament assembled. Thirdly, it is a generall law,

law, whereof the judges may take knowledge, and therefore it is to be determined by them, whether it be a statute or no (1). Now for the divers formes of acts of parliament, you may read them in the Prince's case, *ubi supra*.

"*Apfel quia emptores terrarum.*" This statute is called so, because the statute beginneth with these words, *Quia emptores terrarum*.

(Post. 143.  
2 Inst. 500.)

"*Nul poet aliener, &c. terres infec simple a tener de luy meisme.*"

This is justly inferred upon the statute; but the letter of the statute is, that *feoffatus teneat terram illam de capitali domino, &c.* So as by the authority of *Littleton*, he that citeth a statute, is not bound to recite the very words thereof, so long as he misseth not of the substance and necessary consequence thereupon; and yet the safer way is to vouch the words of a law, as they be.

"*Granta per licence meisme le tenements, &c.* Here *Littleton* speaketh of a licence, or a dispensation within the said statute of *quia emptores terrarum* (and mentioneth no other statute) which may be done by the king and all the lords immediate and mediate: for it is a rule in law, *alienatio licet prohibeatur, consensu tamen omnium,*

[99. a.] *in quorum favorem prohibita est, potest fieri, and quilibet potest renunciare juri pro se introducto:* and the licence of lords immediate and mediate in this case shall enure to two intents, viz. to a dispensation both of the statute of *quia emptores terrarum*, and of the statutes of mortmaine, as *Littleton* here implyeth, because their deedes shall be taken most strongly against themselves (1). But it is a safe and good policy in the king's licence to have a *non obstante* also of the statutes of mortmaine, and not only a *non obstante* of the statute of *quia emptores terrarum*. But it appeareth by *Littleton* (which is a secret of law) that there needeth not any *non obstante* by the king of the statutes of mortmaine, for the king shall not be intended to be misconusant of the law; and when he licenseth expressly to alien to an abbot, &c. which is in mortmaine, he needs not make any *non obstante* of the statute of mortmaine, for it is apparent to be granted in mortmaine, and the king is the head of the law, and therefore *presumitur rex habere omnia jura in scrinio pectoris sui*, for the maintenance of his grant to be good according to the law, for which cause of purpose *Littleton* maketh no mention of any licence in mortmaine. *Dispensatio est mali prohibiti provida relaxatio, utilitate seu necessitate pensata.*

13 E. 3. tit.  
Relicson 31.  
37 H. 8.  
F. N. B. 211. l.

44 Ass. Pl. 19.  
9 E. 4. b. 11.  
Pl. Com. 502.  
503. Grendon's  
case. Vide 10.  
Co. 25, 26, 31.  
§ 120. Vide  
Sect. 696.  
(5 Co. 56.  
7 Co. 14.)

"*L'abbe tiendra, &c. per service chivaler.*" For although by the death of the abbot there is neither ward, marriage, nor relief due, yet he holdeth by knights service, albeit the lord cannot have the fruit of it; and if the abbot, with the consent of the covenant, alien the land over to a man and his heires, there is the ward, marriage, and reliefe revived. But by prescription (as it hath been said) the successor of an abbot may pay reliefe. An abbot or prior, &c. that holdeth lands by knights service, albeit he ought not in respect of his profession to serve in warre in proper person, yet must he find a sufficient

(Ante 70. b.)  
Lit. fol. 20. a.  
(3 Ro. Abr. 512.)  
3 R. 2. Mellet 14:  
3 H. 4. 2. a.  
(Ante 84. a.)  
Vide Little.  
fol. 20.

99. a.]

(1) [See Note 107.]

(1) [See Note 108.]

scient man, conveniently arrayed for the warre, to supply his place. And if he can find none, then must he pay escuage, &c. for his profession doth not privileged him, but that the king's service in his warre must be done, that belongeth to his tenure.

*Nota*, (reader) since *Littleton* wrote, a man might either in his life-time, or by his last will in writing, [m] give lands, tenements, &c. to any spirituall body politick or corporate, to be holden of himselfe in frankalmoigne, or by divine service, as by the statute of 1 and 2. *Phil. & Marie* (which indured for twenty years) appeareth; which statute, since that time, hath bene favourably and benignely expounded.

[m] 1 & 2 Ph.  
& Mar. c. 8.  
Mich. 2 & 3  
Eliz. Dyer fol  
259.

13 E. 4. 4.

*"Issint que nul poet tener en frankalmoigne, si non que soit per title de prescription, &c."* It is to be understood, that a man seised of lands may at this day give the same to a bishop, parson, &c. and their successors in frankalmoigne, by the consent of the king, and the lords mediate and immediate, of whom the land is holden; for the rule is, *quilibet potest renunciare juri pro se introducto*.

27 H. 8. 2 E. 2.  
Avenue 186.

So if an ecclesiasticall person holds lands by fealty and certain rent, the lord at this day may confirme [n] his estate, to hold to him and his successors in frankalmoigne; for the former services be extinct, and nothing is reserved but that he holds of him, and so he did before.

[n] 4 E. 3. 21.  
23 E. 3. 12.  
38 H. 6. 25.  
Lit. cap. Confir-  
mat. 121.

*"Mes le roi poet, &c. car il est hors de case del statute."*

It is cleere that the king is out of the case of the statute: for the statute is, *quod si offitus teneat terram illam, &c. de capit ali domino feodi, &c.* and this cannot be intended of the king, who is superior to all, and inferiour to none, but where the king is bound by acts of parliament and where not. *Vide* 11. Co. 66. *Magdalen Colledge case*.

11 Co. 66.  
Magdalen Col-  
ledge case.

## Sect. 141.

**E**T nota, que nul poet tener terres ou tenements en frankalmoigne, forsprie del grantor, ou de ses heires. Et pur ceo il est dit, que si soit seignior mesne et tenant, et le tenant est un abbe, que tient de son mesme en frankalmoigne, si le mesne devy sans heire, donque le mesnaltie deviendra par escheate al dit seignior paramount, et l'abbe adonque tient de luy immediate per feallie tantum, et ferra a luy fealty; pur ceo que il ne puit tener de luy en frankalmoigne, &c.

**A**ND note, that none may hold lands or tenements in frankalmoigne, but of the grantor, or of his heires. And therefore it is said, that if there be lord mesne and tenant, and the tenant is an abbot, which holdeth of his mesne in frankalmoigne, if the mesne die without heire, the mesnaltie shall come by escheate to the said lord paramount, and the abbot shall then hold immediately of him by fealty only, and shall do to him fealty; because he cannot hold of him in frankalmoigne, &c.

14 E. 3. tit.  
Mesne, 7.  
14 H. 3. tit.  
Distain. Br. 33.

**F**ORSPRISE del grantor, ou de ses heire."

The tenure in frankalmoigne is an incident to the inheritable blood of the grantor, and cannot be transferred nor forfeited to



to any other, no more than a foundershipe of a house of religion, (which is intended to be in frankalmoigne, or homage ancestrel, or the writ of *contra formam feoffamenti*, or the writ of *contra formam collationis*, or any other incident to their inheritable blood. But it is no incident inseparable; for the lord may release to the tenant in frankalmoigne, and then the tenure is extinct, and he shall hold of the lord paramount by fealty, as in the case of *Littleton*, Sect. 139.

28 H. 6. 20. 4 E. 2. *Avowry* 201, 202. 19 E. 3. *Id.* 122. 11 E. 3. *Id.* 100. 30 H. 6. 7. 28 E. 3. *Dyer* 51. F. N. B. 211. c. 15 E. 3. *Confirm.* 8.

15 E. 3. *Confirm.* 8.  
27 H. 6. b.  
Temps E. 1.  
Garr. 90.  
45 E. 3. 22.  
47 H. 3. Garr.  
99. 11 H. 4. 62.  
14 H. 4. 5.  
10 H. 7. 11.  
28. Ass. 33.  
18 E. 3. 18.  
23 E. 3. 18.  
Corody Broke 5.

"*Ou de ses heires.*" Here (or) hath the sense of (and); for a man cannot at this day grant lands in taile and reserve a rent to his heires, and exclude the grantor himselfe; for the heire cannot take any thing in the life of the ancestor, neither can the heire take any thing by descent, when the ancestor himselfe is seclused. But if a man had granted lands at the common law to hold of his heires, these words (to hold of his heires) are void, and he shall hold of the grantor as he held over, which he should have done, if he had made no reservation at all.

And albeit *Littleton* saith, that no man can hold lands in frankalmoign but of the grantor or his heires, yet might an abbot by assent of his covent, or a bishop with assent of his chapter, and such like, by license as is aforesaid, have given lands in frankalmoigne, to hold of them and their successors; and as *Littleton* himselfe agreeth, the king may give land in frankalmoigne, in which case the land shall be holden of him, his heires and successors.

"*Et pur ceo est dit, si soit seignior meane et tenant, et le tenant est un abbe, &c.*" By this it appeareth, that if the seigniori be transferred by act in law to a stranger, and thereby the privity is altered, that the tenure in frankalmoigne is changed to a tenure in socage by fealty, as well as it appeareth before: when the seigniori or tenancy is granted to another; and the law in this case also createth a new fealty, wherewith the land was not charged before.

"*Douques le mesnaltie deviendra per escheat al dit seignior paramount.*" This new tenure, created by law, shall upon the escheate drowne the seigniori; for alwaies the seigniori neerer to the land drownes the seigniori that is more remote off; and yet the lord in this case, to whom the mesnaltie is escheated, shall hold by the same services that he held before the escheat.

Vide 15 E. 4.  
(3. Ro. Abr. 447.  
curiam—High. 289.  
Post. 143. 213. b.)

33 E. 3. dt.  
Annuity 52.  
3. Ass. Pl. 3, &c.

2 E. 4. 46.  
(3. Ro. Abr.  
501. 513.)  
7 E. 4. 62. a.

## Sect. 142.

**E**T nota, que lous tiel home de religion tient ses tenements de son seignior en frankalmoign, son seignior est tenu per la ley de luy acquitter de chescun manner de service que aucun seignior paramount de luy voet aver ou demander de mesmes les tenements; et s'il

**A**ND note, that where such man of religion holds his tenements of his lord in frankalmoigne, his lord is bound by the law to acquite him of every manner of service which any lord paramount will have or demand of him for the same tenements;

scient man, conveniently arrayed for the warre, to supply his place. And if he can find none, then must he pay escuage, &c. for his profession doth not privilege him, but that the king's service in his warre must be done, that belongeth to his tenure.

*Nota*, (reader) since *Littleton* wrote, a man might either in his life-time, or by his last will in writing, [m] give lands, tenements, &c. to any spirituall body politick or corporate, to be holden of himselfe in frankalmoigne, or by divine service, as by the statute of 1 and 2. *Phil. & Maria* (which indured for twenty years) appeareth; which statute, since that time, hath benee favourably and benignely expounded.

[m] 1 & 2 Ph.  
& Mar. c. 8:  
Mich. 8 & 9  
Ediz. Dyer fol  
254.

13 E. 4. 4.

27 H. 2. 2 E. 2.  
Averdie 186.

*"Insint que nul poet tener en frankalmoigne, si non que soit per title de prescription, &c."* It is to be understood, that a man seised of lands may at this day give the same to a bishop, parson, &c. and their successors in frankalmoigne, by the consent of the king, and the lords mediate and immediate, of whom the land is holden; for the rule is, *quilibet potest renunciare juri pro se introducto*.

So if an ecclesiasticall person holds lands by fealty and certaine rent, the lord at this day may confirme [n] his estate, to hold to him and his successors in frankalmoigne; for the former services be extinct, and nothing is reserved but that he holds of him, and so he did before.

[n] 4 E. 3. 21.  
23 E. 3. 16.  
38 H. 6. 25.  
Litt. cap. Confir-  
mat. 131.

*"Mes le roy poet, &c. car il est hors de case del statute."*

It is cleere that the king is out of the case of the statute: for the statute is, *quod si offitus teneat terram illam, &c. de capite ali domini feodi, &c.* and this cannot be intended of the king, who is superior to all, and inferiour to none, but where the king is bound by acts of parliament and where not. *Vide* 11. Co. 66. *Magdalen Colledge case*.

11 Co. 66.  
Magdalen Col-  
ledge case.

## Sect. 141.

**E**T nota, que nul poit tener terres ou tenements en frankalmoigne, forsprise del grantor, ou de ses heires. Et pur ceo il est dit, que si soit seignior mesne et tenant, et le tenant est un abbe, que tient de son mesme en frankalmoigne, si le mesne devy sans heire, donque le mesnaltie deviendra par escheate al dit seignior paramount, et l'abbe adonque tient de luy immediate per feallie tantum, et ferra a luy fealty; pur ceo que il ne puit tener de luy en frankalmoigne, &c.

**A**ND note, that none may hold lands or tenements in frankalmoigne, but of the grauntor, or of his heires. And therefore it is said, that if there be lord mesne and tenant, and the tenant is an abbot, which holdeth of his mesne in frankalmoigne, if the mesne die without heire, the mesnaltie shall come by escheate to the said lord paramount, and the abbot shall then hold immediately of him by fealty only, and shall do to him fealty; because he cannot hold of him in frankalmoign, &c.

24 E. 3. tit.  
Mesne, 7.  
24 H. 3. tit.  
Directum. Br. 33.

*"FORSPIRSE del grantor, ou de ses heirs."*

The tenure in frankalmoigne is an incident to the inheritable blood of the grantor, and cannot be transferred nor forfeited to

to any other, no more than a foundership of a house of religion, (which is intended to be in frankalmoigne, or homage ancestral, or the writ of *contra formam feoffamenti*, or the writ of *contra formam collationis*, or any other incident to their inheritable blood. But it is no incident inseparable; for the lord may release to the tenant in frankalmoigne, and then the tenure is extinct, and he shall hold of the lord paramount by fealty, as in the case of *Littleton*, Sect. 139.

15 E. 3. Confirm. 8.  
27 H. 8. b.  
Tempe E. 1. Gav. 90.  
45 E. 3. 23.  
47 H. 3. Garr.  
99. 11 E. 4. 62.  
14 H. 4. 5.  
10 H. 7. 11.  
28. Ass. 32.  
18 E. 3. 18.  
23 E. 3. 18.  
Corody Broke 5.  
Dyer 51. F. N. B. 16.

20 H. 6. 20. 4 E. 2. Avowry 201, 202. 19 E. 3. Ibid. 122. 11 E. 3. Ibid. 100. 30 H. 6. 7. 28 E. 3. Dyer 51. F. N. B. 211. c. 16 E. 3. Confirm. 8.

"*Ou de ses heires.*" Here (or) hath the sense of (and); for a man cannot at this day grant lands in taile and reserve a rent to his heires, and exclude the grantor himselfe; for the heire cannot take any thing in the life of the ancestor, neither can the heire take any thing by descent, when the ancestor himselfe is seclused. But if a man had granted lands at the common law to hold of his heires, these words (to hold of his heires) are void, and he shall hold of the grantor as he held over, which he should have done, if he had made no reservation at all.

Vide 15 E. 4.  
(2. Ro. Abr. 467.  
curiam—f. 104. 1304.  
Post 143. 213. b.)

33 E. 3. tit.  
Annuity 52.  
3. Ass. Pl. 3. &c.

And albeit *Littleton* saith, that no man can hold lands in frankalmoign but of the grantor or his heires, yet might an abbot by assent of his covent, or a bishop with assent of his chapter, and such like, by license as is aforesaid, have given lands in frankalmoigne, to hold of them and their successors; and as *Littleton* himselfe agreeth, the king may give land in frankalmoigne, in which case the land shall be holden of him, his heires and successors.

"*Et par ceo est dit, si soit seignior mesne et tenant, et le tenant est un abbe, &c.*" By this it appeareth, that if the seigniorie be transferred by act in law to a stranger, and thereby the privy is altered, that the tenure in frankalmoigne is changed to a tenure in socage by fealty, as well as it appeareth before when the seigniorie or tenancy is granted to another; and the law in this case also createth a new fealty, wherewith the land was not charged before.

"*Donques le mesnaltie deviendra per escheat al dit seignior paramount.*" This new tenure, created by law, shall upon the escheate drowne the seigniorie; for alwaies the seigniorie neerer to the land drownes the seigniorie that is more remote off; and yet the lord in this case, to whom the mesnaltie is escheated, shall hold by the same services that he held before the escheat.

2 E. 4. 46.  
(2. Ro. Abr.  
201. 513.)  
7 E. 4. 22. a.

## Sect. 142.

**E**T nota, que tout tel homme de religion tient ses tenements de son seignior en frankalmoign, son seignior est tenu par la ley de luy acquiescer de chescun manner de service que aucun seignior paramount de luy voet aver ou demander de mesmes les tenements; et s'il

**A**ND note, that where such man of religion holds his tenements of his lord in frankalmoigne, his lord is bound by the law to acquiesce him of every manner of service which any lord paramount will have or demand of him for the same tenements;

*s'il ne luy acquita pas, mes suffra luy d'estre distraine, &c. donque il avera envers son seignior un briefe de mesne, et recovra envers luy ses damages et ses costes de son suit, &c.*

tenements; and if he doth not acquite him, but suffereth him to be distreyned, &c. he shall have against his lord a writ of mesne, and shall recover against him his damages and costs of suit, &c.

“**H**OME de religion.” And yet this case extendeth to all ecclesiasticall persons that hold in frankalmoigne, be they secular or regular; for the mesne ought to acquite all of them; for they be bound [a] to make praiers for their founder, and his heires; and in consideration of those prayers, the founder, &c. is bound to pay to the chiefe lord all rents and services issuing out of that land, as it appeareth by that which followeth.

[a] Pl. Com. 206.  
b. In Sherington's case.  
33 H. 4. 4.  
39 H. 4. 29.  
14 E. 3. Mesne 7.

[b] Fleta, lib. 2. ca. 43. Britton, fol. 56, 57.  
Vide hereafter in this Sect. in briefe de Mesne  
[c] Vide Sect. 143. 140.  
[d] 8 E. 2. Corone 294.  
20 E. 2. ibid.  
238. Stauf. Pl. Corone 108.  
[e] 4 E. 3. 33.  
17 E. 2. 44.  
7 H. 4. 18.  
34 H. 4. 47.  
13 E. 4. 6.  
F. N. B. 130.  
9. Co. 110, 111.  
In Tuckman's case.  
5 E. 3. 14. 77.  
5 E. 3. 11.  
4 H. 6. 39.  
39 E. 3. 19.  
11 H. 4. 33.  
13 H. 4. 9.  
14 H. 4. 17.  
F. N. B. 130. b. h.  
39 H. 4. 30.  
33 H. 6. 7.  
F. N. B. 134. m.  
4 E. 4. 34.  
13 H. 4. 6.  
28 E. 3. 92.  
17 E. 3. 30.  
[f] 39 H. 6.  
31. a. 9 E. 4. 27.  
F. N. B. 130. m.  
17 E. 3. Mesne.  
5 E. 3. 49.  
Britton, lib. 2. fol. 94.  
[g] 4 E. 3. 49.  
For this writ see the Register fol. and F. N. B. fol. 135.  
Mirror, cap. 2. sect. 13.  
Britton, lib. 2. fol. 94.  
Britton, fol. 55.  
Fleta, lib. 2. ca. 43.  
Westm. 2. cap. 9.

“*De luy acquiter.*” *Acquiter* is compounded of *ad*, and the old *verbe quietare*, and signifieth in law [b] to discharge, [100. a.] or keepe in quiet, and to see that the tenant be safely kept from any entries, or other molestation for any manner of service issuing out of the land to any lord that is above the mesne. [c] And hereof commeth [d] acquitall, and *quietus est*, (that is) that he is discharged; and he that is discharged of a felony, &c. by judgement, is said to be acquitted of the felony, *acquietatus de feloniâ*; and if he be drawne in question againe, he may plead [e] *auterfois acquite*. And therefore if such a tenant, as *Littleton* here speaketh of, be distrained by any lord paramount, the mesne (to keep the tenant quiet) may put his beasts in the pownd, instead of the beasts of the tenant.

There be three kinds of acquittals. 1. An acquitall by deed. 2. An acquitall by prescription. 3. An acquitall by tenure: and by tenure foure manners of wayes. 1. By owelty of services, for service acquits service. 2. Tenure in frankalmoigne, wherof *Littleton* here speaketh. 3. Tenure in frankmariage. 4. Tenure by reason of dower.

“*De chescun manner de service.*” [f] And yet not of services onely, as homage, fealty, rentworkes, and other services, but also of improvement of services; as if he be distreyned for reliefe,\* *aide pur file marier, aide pur faire, fitz chivaler, &c.* Also for suite service to a hundred. [g] But for suit reall in respect of resiance within any hundred, leet, or turne, the mesne shall make no acquitall, for that is in respect of his person and resiancy.

“*Briefe de mesne,*” *Breve de medio*, a writ of mesne, so called by reason of the words of the writ of mesne, which are, *unde idem A. qui medius est inter C. et prefatum B. A. who is mesne, between C. that is the lord paramount, and B. that is the tenant paravaile.* And note, that there be six writs in law, that they may be maintained, *quia timet*, before any molestation; distresse, or impleading: as 1. A man may have his writ of *mesne* (wherof *Littleton* here speaks) before he be distreyned. 2. A *warrantia carta*, before he be impleaded.

3. A *mon-*

5. A *monstraverunt*, before any distresse or vexation. 4. An *audita querela*, before any execution sued. 5. A *curia claudenda*, before any default of inclosure. 6. A *ne iniuste vexes*, before any distresse or molestation. And these be called *brevis anticipantis*, writs of prevention.

“*Et recovera vero luy ses damages.*” It is to be knowne, that there be two severall judgements in a writ of mesne, one at the common law, another by the statute of *W. 2. ca. 9.* At the common law he shall have judgment to recover his acquitall, and if he be distreyned or damnified, his damages and costs: and the processe at the common law was summons, attachment and distresse infinite, in the same county where the writ is brought. \*The judgement by the said statute of *W. 2.* is a forejudger of the mesnalty, and that in two severall cases. One upon processe given by the said statute, viz. summons, attachment, and grand distresse, and if he commeth not, and the writ be returned, he shall be forjudged. The other case is, where the tenant recovereth his acquitall in a writ of mesne, if he be not acquitted afterwards, he shall have a writ of *distringas ad acquietandum* against the same mesne, and if he commeth not, he shall be forjudged by his default of the mesnalty; and so if he commeth, and it be found against him by verdict, he shall be forjudged: but forjudger in that case is not given against his heire, for that the statute speaketh onely of the mesne, and not of his heires. And the judgment in case of forjudgement is, *quodd T. (le mesne) amittat servitia de A. (le tenant) de tenementis predictis, et quoddammodo predicto T. prefat’ R. (le seignior paramount) modo sit attendens et respondens per eadem servitia per que T. tenuit.* The said statute, in case of forjudgement, doth not bind a feme covert; and yet if such a judgement be given against a baron and feme, it is not void, but erroneous, and to be reversed in a writ of error. And so a forjudgement against a tenant in taile shall binde the issue in taile in an avowry, untill he reverseth it by error. If two joyntenants bring a writ of mesne, and the one is summoned and severed, the other cannot forjudge the mesne; for he ought to be attendant to the lord paramount, as the mesne was, and that cannot he be alone. And so it is if there be two joyntenants mesnes, and in a writ of mesne brought against them, one maketh default, and the other appeares, there can be no forjudger.

[100. b.] If the tenant be disseised, and the disseisor in a writ of mesne forjudge the mesne, this shall not bind the disseisee. And so if the mesne be disseised, and a forjudgement is had against the disseisor, this doth not bind the disseisee; for the words of the said statute, are, *quando tenens sine prejudicio alterius quam medii attornare se potest capitali domino.*

But if the daughter, the sonne being *ex venter sa mere*, be forjudged, it shall bind the son that is borne afterwards, because he had no right at the time of the forjudgment. And so if the tenant enter in religion, and his heire forejudgeth the mesne, and then the ancestor is deraigned, he shall be bound *causa qua suavit.* If there be lord, prior mesne, and tenant, the mesne cannot be forjudged; because he alone can doe nothing to the prejudice or the disherison of his church: and the like law is of a bishop, parson, and the like.

No forjudgement can be, but when there is but one mesne betweene the lord distreyning and the tenant; because the tenant,

*W. 2. ca. 9.*  
*Vide 8. Co. 134.*  
*Mary Shepley’s*  
*case*

\* Bracton, lib. 2.  
fol. 84.  
Fleta, lib. 2.  
cap. 43.

46 E. 3. 31.  
18 E. 3. tit.  
Mesne. E. N. B.  
136. 2 H. 4. 7.  
17 E. 3. Contra  
formam Cellat. 1.  
F. N. B. 131.

(Post. 237. b.)  
7 E. 3. 41. tit.  
Mesne 18.  
9 E. 2. ibid. 67.  
14 E. 2. ibid. 70.  
9 Co. 73. b.  
Doct. Hussey’s  
case.

(10 Co. 134.)

16 E. 3. Judgm.  
117.  
(7 Co. 8. a.)  
*W. 2. ca. 9.*

*est fait d'ascun manner de service; car nul poet tener en frankealmoigne, si soit expresse ascun manner de certain service que il doit faire, &c.*

by divine service. For in tenure in frankealmoigne no mention is made of any manner of service; for none can hold in frankealmoigne, if there be expressed any manner of certaine service that he ought to doe, &c.

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**P**ER certaine divine service d'estre fait, sicome a chaunter un messe, &c. ou de distributer en almoign, &c." Here be the two parts above mentioned, of divine service; and for this divine service certaine, the lord hath his remedy, as here it appeares by our author, in *foro seculari*: for here it appears, that if the lord distreigne for not doing of divine service, which is certaine, he shall upon his avowry recover damages at the common law, that is, in the king's temporal court, for the not doing of it. And if issue be taken upon the performance of the divine service, it shall be tried by a jury of twelve men; because albeit the service be spirituall, yet the damages are temporall, and so is the seigniorie also.

(2. Co. 78. b.  
F. N. B. 209. L.)

38 H. 6. 26, 27.

2 E. 6. ca. 13.  
versus finem.  
13 E. 3. ca. 5.  
11 H. 7. c. 5.  
1 El. ca. 2.  
13 El. ca. 1.  
23 El. ca. 1.  
1 Ja. c. 11. & 12.

And here is implied another maxime of the law, that where the common or statute law giveth remedy in *foro seculari*, (whether the matter be temporall or spirituall) the consusans of that cause (4. Co. 30.) belonging to the king's temporall courts onely; unlesse the jurisdiction of the ecclesiasticall court be saved or allowed by the same statute, to proceed according to the ecclesiasticall lawes.

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*"Ou de distributer en almoigne al cent povres homes."* Here note, that the almes and reliefe of poor people, being a work of charity, is accounted in law divine service; for what herein is done to the poore for God's sake, is done to God himselfe.

*"Poet distreiner, &c."* Here (&c.) includeth many excellent things, as when, where, and what may be distreyned, of [97. a.] all which there is a taste given in their proper places.

*"En tiel case le seignior avera fealtie, &c. come semble."* For, as it hath beene said, fealty is incident to every tenure, saving the tenure in frankalmoigne, and where the lord may distreine, there is fealty due. And *Britton* calleth this tenure (by divine service) *aumone*, and not *libera eleemosina*. And, saith he, *tenure en aumone est terre ou tenement que est done a aumone, dount ascun service est retenue al seoffor*.

Brit. B. 164.

*"&c."* And here (&c.) implyeth distresse, escheat, and the like.

33 H. 6. fol. 6.  
Brit. ca. 66.

*"Et tiel tenure n'est pas dit tenure en frankalmoigne, eins est dit tenure per divine service, &c."* And therefore our old bookes divided spirituall service into free almes (which was free from any limitation of certainty) and almes, because the tenants were bound to certaine divine services.

(2. Inst. 460.)  
13 E. 1. Count  
de Vouch. 116.

*"S'il soit expresse ascun manner de certaine service."* This holdeth where the certainty is reserved upon the original grant. If lands were given to hold in *liberâ eleemosinâ, reddendo* a rent, it seemeth the reservation of the rent to be void, \* because it is repugnant and contrary to the former grant in *liberâ eleemosinâ*.

\* 13 H. 4. tit.  
Meine 74.  
30 E. 3. 30.  
19 E. 2.  
Arowrie 224.  
50. Ass. pl. 6.

33 E. 1. Taille 31. 26. Ass. 66. 4 H. 6. 17. Trin. 4 E. 3. F. N. B. 262. f. 15 E. 3. Corody 4. 11. Ass. 22.

*Fide*

*Vide Trin. 4 E. 3. and F. N. B. 231. f.* that an abbot or prior that hold in frankalmoigne shall not be charged with a corody. Also lands holden in frankalmoigne cannot [1] be ancient demesne, in respect of charges incident thereunto.

[1] 32 E. 1.  
Ant. Dem. 26.  
3 E. 3. 4.

"*Que il doit faire, &c.*" Here by (*&c.*) is understood temporall or spirituall service also, which he ought to doe corporally, or render, or pay.

There were within this realme of *Englande* one hundred and eightene monasteries, founded by the kings of *Englande*; whereof such abbots and priors as were founded to hold of the king *per baroniam*, and were called to the parliament by writ, were lords of parliament, and had places and voices there. \*And of them there were twenty-seven abbots and two priors, as by the rolles of parliament appeares. But since our author wrote, all these (as hath beene said) (1) are dissolved. King *Stephen* did found the abbey of *Feversham*, in Kent, *et dedit abbati et monachis, et successoribus suis, manerium de Feversham in com. Kancia, simul cum hundredo, &c. tenendum per baroniam, &c.* who albeit he held by a barony, yet because he was never (that I [m] finde) called by writ, he never sate in parliament.

(F. N. B. 231. a.)  
\* Per exemplum,  
Rot. Parl.  
4 E. 3. 4.  
31 E. 3. 4. 5.

All the archbishops and bishops of *England* have beene founded by the kings of *England*, and doe hold of the king by barony (as before hath beene said), (2) and have beene all called by writ to the court of parliament, and are lords of parliament. As (amongst many) take one notable record: [*o*] *Mandatum est omnibus episcopis, qui conventuri sunt apud Gloucestriam, die Sabbati in crastin. sancte Katharine, firmiter inhibendo, quod sicut baronias suas, quas de rege tenent, diligunt, nullo modo presumant consilium tenere de aliquibus que ad coronam regis pertinent, vel que personam regis, vel statum suum, vel statum consilii sui contingunt, scituri pro certo, quod si fecerint, rex inde se capiet ad baronias suas. Teste rege apud Hereford, 23 Novemb. &c.* And the bishopricks in *Wales* were founded by the princes of *Wales*; and the principality of *Wales* was holden of the king of *England*, as of his crowne; and when the prince of *Wales* committed treason, rebellion, &c. the principality was forfeited, and the patronages of the bishops annexed to the crowne of *England*, so as the king is to have pensions for his chaplaines, and corodies for his vadelets, of them, as of bishops founded by himselfe (3). And *vide Mich. 10 H. 4. Rot. 60. Wollia coram rege*, that the judgment was given accordingly against the bishop of *St. David's* in *Wales*, *per justiciarios de utroque banco et alios de perito consilio domini regis*. And the bishbps of *Wales* are also called by writ to parliament, and are lords of parliament, as bishops of *England* be.

[m] Cons. Pts.  
30 E. 1. coram  
rege this foundation  
is so pleaded.  
(Post. 134. a.  
344. a.)

[o] Ex. rot. post. de  
mimo 14. E. 3. m. 17.

10 E. 4. fo. 6. b

(1) See ante 94. a.

(3) [See Note 106.]

(2) See ante 70. b. and note 2. there.

*est fait d'ascun manner de service; car nul poet tener en frankalmoigne, si soit expresse ascun manner de certain service que il doit faire, &c.*

by divine service. For in tenure in frankalmoigne no mention is made of any manner of service; for none can hold in frankalmoigne, if there be expressed any manner of certaine service that he ought to doe, &c.

2 E. 3. 27, 28.

**P**ER certaine divine service d'estre fait, sicome a chaunter un messe, &c. ou de distributer en almoign, &c." Here be the two parts above mentioned, of divine service; and for this divine service certaine, the lord hath his remedy, as here it appeares by our author, in *foro seculari*: for here it appears, that if the lord distreinie for not doing of divine service, which is certaine, he shall upon his avowry recover damages at the common law, that is, in the king's temporal court, for the not doing of it. And if issue be taken upon the performance of the divine service, it shall be tried by a jury of twelve men; because albeit the service be spirituall, yet the damages are temporall, and so is the seigniorie also.

(2. Co. 78. b.  
F. N. B. 209. L.)

38 H. 6. 26, 27.

2 E. 6. ca. 13.  
versus finem.  
13 E. 3. ca. 5.  
11 H. 7. c. 8.  
1 El. ca. 2.  
13 El. ca. 1.  
23 El. ca. 1.  
1 Ja. c. 11. & 12.

And here is implied another maxime of the law, that where the common or statute law giveth remedy in *foro seculari*, (whether the matter be temporall or spirituall) the consusans of that cause (4. Co. 20.) belonging to the king's temporall courts onely; unlesse the jurisdiction of the ecclesiasticall court be saved or allowed by the same statute, to proceed according to the ecclesiasticall lawes.

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*"Poet distreiner, &c."* Here (&c.) includeth many excellent things, as when, where, and what may be distreyned, of [97. a.] all which there is a taste given in their proper places.

*"En tiel case le seignior avera fealtie, &c. come semble."* For, as it hath beene said, fealty is incident to every tenure, saving the tenure in frankalmoigne, and where the lord may distreine, there is fealty due. And *Britton* calleth this tenure (by divine service) *aumone*, and not *libera eleemosina*. And, saith he, *tenure en aumone est terre ou tenement que est done a aumone, dount ascun service est retenue al seoffor*.

Brit. fo. 164.

*"&c."* And here (&c.) implyeth distresse, escheat, and the like.

33 H. 6. fol. 6.  
Brit. ca. 66.

*"Et tiel tenure n'est pas dit tenure en frankalmoigne, eins est dit tenure per divine service, &c."* And therefore our old bookes divided spirituall service into free almes (which was free from any limitation of certainty) and almes, because the tenants were bound to certaine divine services.

(2. Inst. 460.)  
13 E. 1. Count  
de Vouch. 116.

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\* 13 H. 4. tit.  
Meine 74.  
30 E. 3. 30.  
19 E. 2.  
Avowry 224.  
60. Ass. pl. 6.

32 E. 1. Taille 31. 26. Ass. 66. 4 H. 6. 17. Trin. 4 E. 3. F. N. B. 252. f. 15 E. 3. Corody 4. 11. Ass. 22.

*Fide*



*Vide Trin. 4 E. 3. and F. N. B. 231. f.* that an abbot or prior that hold in frankalmoigne shall not be charged with a corody. Also lands holden in frankalmoigne cannot [1] be ancient demesne, in respect of charges incident thereunto.

[7] 32 E. 1.  
Ant. Decm. 26.  
3 E. 3. 4.

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(F. N. B. 232. a.)  
\* Per exemplum,  
Rot. Parl.  
3 E. 3. 4.  
21 E. 4. 12a

All the archbishops and bishops of *England* have beene founded by the kings of *England*, and doe hold of the king by barony (as before hath beene said), (2) and have beene all called by writ to the court of parliament, and are lords of parliament. As (amongst many) take one notable record: [*o*] *Mandatum est omnibus episcopis, qui conventuri sunt apud Gloucestriam, die Sabbati in crastin. sancte Katharine, firmiter inhibendo, quod sicut baronias suas, quas de rege tenent, diligunt, nullo modo presumant consilium tenere de aliquibus que ad coronam regis pertinent, vel que personam regis, vel statum suum, vel statum consilii sui contingunt, scituri pro certo, quod si fecerint, rex inde se capiet ad baronias suas. Teste rege apud Hereford, 23 Novemb. &c.* And the bishoprickes in *Wales* were founded by the princes of *Wales*; and the principality of *Wales* was holden of the king of *England*, as of his crowne; and when the prince of *Wales* committed treason, rebellion, &c. the principality was forfeited, and the patronages of the bishops annexed to the crowne of *England*, so as the king is to have pensions for his chaplaines, and corodies for his vadelets, of them, as of bishops founded by himselfe (3). And *vide Mich. 10 H. 4. Rot. 60. Wallia coram rege*, that the judgment was given accordingly against the bishop of *St. David's* in *Wales*, *per justiciarios de utroque banco et alios de perito consilio domini regis*. And the bishops of *Wales* are also called by writ to parliament, and are lords of parliament, as bishops of *England* be.

[m] Cons. Pto.  
30 E. 1. coram  
rege this foundation  
is so pleaded.  
(Rot. 134. a.  
344. a.)

[o] Ex. rot. post, de  
mimo 14. E. 3. m. 17.

10 E. 4. 2. c. b

(1) See ante 94. a.

(3) [See Note 106.]

(2) See ante 70. b. and note 2. there.

vouchee make default, and the demandant hath judgement against the tenant, and after brings a *scire facias* to have execution, the tenant may have a *warrantia carta*, and if he were impleaded by a stranger, he may vouch again; but if he had judgement to recover in value, he shall never have a *warrantia carta*, or vouch againe, for by this judgement to recover in value he hath benefit of the warranty. And you shall finde in bookes a recovery with a single voucher, and that is when there is but one voucher; and with a double voucher, and that is when the vouchee voucheth over; and so a treble voucher, &c. Againe, you shall finde there also a foraine voucher, and that is, when the tenant, being impleaded within a particular jurisdiction, (as in London or the like) voucheth one to warranty, and prayes that he may be summoned in some other county out of the jurisdiction of that court. This is called a foraine voucher, but might more aptly be called a voucher of a forainer, *de forinaecis vocatis ad warrantizandum*. Note, that by the civill law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no expresse warranty; but the common law bindeth him not, unlesse there be a warranty, either in deed or in law; for *caveat emptor*, as shall be said more at large in the Chapter of Warranty in the Third Booke.

Glose. c. 12.  
F. N. B. 6. c.

(Cro. Jac. 4.  
1. Ro. Abr. 96.  
F. N. B. 94.)

Brit. 174.

“*Le seignior (s'il voet) poet disclaymer en le seignorie.*” *Disclaimer*, *disclamare*, is compounded of *de* and *clamo*, and signifieth utterly to renounce the seignorie.

[a] Note, there be divers kinds of disclaimer, that is to say, a disclaimer in the tenancie; a disclaymer in the blood; and a disclaimer in the seignorie; whereof *Littleton* here putteth his case.

[b] But if the tenant in frankalmoigne bring a writ of mesne against his lord, the lord cannot disclayne in the seignorie; because he cannot hold of any man in frankalmoigne, but of his donor and his heires. And so note a diversitie between a tenure in frankalmoigne, whereby divine service is maintained, and homage auncestrell, which respecteth temporall service. But if the lord will not disclayne in the seignory, in the case of homage auncestrell, then albeit he hath not received homage, he shall warrant the land.

[c] 47 H. 3.  
Disclaimer. 34.  
16 H. 7. 1.  
20 E. 3. tit.  
Nuper Ob. 14.  
F. N. B. 197.  
8. 151. b.  
48 E. 3. 19.  
21 E. 3.  
50 E. 3. 23, &c.  
(Doctr. Plac. 131.)  
[d] 14 H. 3.  
tit. Disclaimer.  
B. 33.

47 H. 3. Disclaimer.  
34. Vide Bract.  
l. 4. 232.  
b. 16 H. 7. 1.  
Brit. 173, 174.  
(Doctr. Plac. 131.)

“*Si le seignior que est vouche ad receive homage, &c. il ne disclaymera.*” Therefore it is good for the tenant, to the intent to oust the lord of his disclaimer, in his voucher to allege, that the lord hath taken homage of him; and if he alledge it not, and the lord offer to disclayne, the tenant may counterplead the same by acceptance of homage. And the reason that the lord cannot disclayne in that case is, for that he hath accepted his humble and reverent acknowledgement, to become his man of life and member and terrene honour, and to be faithfull and loyall to him, for the tenements which he holds of him, and against the acceptance hereof the lord cannot disclayne.

“*Que il avoit al temps del voucher.*” Hereby it appeareth, that the tenant shall not be driven to recover in value only those lands, which the lord had from that ancestor, which created the seignory, for that were in a manner impossible, for that the seignory must be created before time of memory; and the first creation of the seignory did not create the warranty, but the continuance of both sides time out of minde created the warranty. And that is the reason that  
a writ

a writ of annuity shall not [c] lye against the heire by prescription; because it cannot be knowne, whether he hath any land by descent from the said ancestor, that first granted the annuity. And here is a point worthy of observation, that in the case of homage ancestrell (which is a special warranty in law) by the authority of *Littleton*, the lands generally, that the lord hath at the time of the voucher, shall be liable to execution in value, whether he hath them by descent or purchase. But in the case of an expresse warrantie, the heire shall be charged but only for such lands as he hath by descent from the same ancestor which created the warranty.

Note what privilege this ancient warranty (created by operation of law) hath more than the expresse warranty. And so you may observe, that in this case *firmiter et potentior est operatio legis quam dispositio hominis*.

*"At temps de voucher ou unques puis."* This is evident and worthy of diligent observation, viz. that the lands of the vouches shall be liable to the warranty that the vouches hath at the time of the voucher, for that the voucher is in lieu of an action; and in a *warrantia carta*, the land which the defendant hath at the time of the writ brought, shall be lyable to the warranty.

Upon a judgment in debt, the plaintiff [d] shall not have execution, but only of that land which the defendant had at the time of the judgment, for that the action was brought in respect of the person, and not in respect of the land. But if an action of debt be

[102. b.] brought against the heire, and he alieneth, hanging the writ, yet shall the land which he had at the time of the original purchase, be charged, for that the action was brought against the heire in respect of the land. [c] If a man be nonsuit, the land only which he had at the time of the amerciamento assessed, shall be charged, and not that which he had at the finding of the pledges. For the amerciamento is not in respect of the land, but of his want of prosecution, which was a default in his person. But the issues of a juror shall be levied upon the feoffee, albeit they were not lost before the feoffment, because he was returned and sworn in respect of the land. Note the diversity.

If a man give lands in fee with warranty, and binde certaine lands specially to warranty, the person of the feoffor is hereby bound, and not the land, unless he hath it at the time of the voucher.

[c] 46 E. 3. 5. b.  
10 E. 4. 20. b.  
19 H. 6. 74.  
37 H. 6. 10.  
6 H. 7.  
F. N. B. 188

28 E. 1. Vouch.  
291. 9 E. 2.  
War. Car. 20. 19.  
Finch 127.

29 E. 3. 5.  
18 E. 3. 1.  
3 H. 4. 10.  
23 E. 3. Recov.  
in val. 3. 16 E.  
3. Vouch. 55.  
19 E. 3. Vouch.  
24. 23 E. 3.  
Fitz. Nat. Bre.  
134. 6.  
[d] 9 H. 4. 14.  
49 E. 3. 1.  
49 Ass. 17.  
9 E. 2. 11.  
Execut. 249.  
(1. Ro. Abr.  
598. 597, 592.)

[c] 22. Ass. pl. 32.  
(Finch. L. 353.)

33 E. 1.  
Voucher 392.  
(3. Ro. Abr. 771.)

## Sect. 146.

**E**T est ascavoir, que en chescun cas ou le seignior poit disclamer en son seignorie per la ley, et de ceo voit disclamer en court de record, son seignorie est extinct et letenant tiendra del seignior procheine paramount le seignior que issint disclaime. Mes si un abbe ou prior soit vouch per force de homage ancestrel, &c. comment que il ne unque prist homage, &c. uncore il ne poit disclamer entiel cas,

**A**ND it is to be understood, that in every case where the lord may disclaime in his seignorie by the law, and of this he will disclaime in a court of record, his seignorie is extinct, and the tenant shall hold of the lord next paramount to the lord which so disclaime. But if an abbot or prior be vouched by force of homage ancestrell, &c. albeit that he never tooke

*cas, ne en nul autre cas; car ils ne* tooke homage, &c. yet he cannot  
*potent anienter ou devester chose de* disclaime in this case, nor in any  
*fee, que ad este vestue en leur meason.* other case; for they cannot take  
 away or devest a thing in fee, which  
 hath beene vested in their house.

Vide, Britton,  
 fol. 55. 110.  
 (Doctr. Plac. 133.)  
 [f] 45 E. 3. 7.  
 28 E. 4. 36.

“*S*ION seigniorie est extinct, et le tenant tiendra de seignior pro-  
*chein paramount, &c.*” Here two things are to be observed:  
 first, that by this disclaymer in the seigniorie, the seigniorie is [f]  
 extinct in the land.

Secondly, that after the disclaymer the tenant shall hold of the  
 next lord paramount by the same services as the meane so disclaym-  
 ing held before.

Vide Sect. 143.

“*Si un abbe ou prior soit vouch, &c. comment, &c. uncore il ne poet*  
*disclaymer, &c.*” Here it appeareth of the lord’s side, that continu-  
 ance of blood is not necessary; but yet there must be privity of suc-  
 cession time out of minde in one politicke body; for if that body be  
 once dissolved, though a new one be founded of the same name, and  
 all the possessions be granted to them, yet the homage ancestrell is  
 gone. But if a prior and covent be translated, *concurrentibus his*  
*qua in jure requiruntur*, to an abbot and covent, or to deane and  
 chapter, there the homage ancestrell remaines; for though the name  
 be changed, yet the body was never dissolved, but in effect it re-  
 maineth still. If the body politique were founded within time of  
 memory, there cannot be homage ancestrell, for that continuance  
 faileth; and though ancestor is ever properly applied to a naturall  
 body, yet it is called homage ancestrell when the tenure is of a body  
 politique, for that it is ancestrell of the tenant’s side. But on the  
 other side, an abbot or prior cannot hold by homage ancestrell; for,  
 as appeareth by *Littleton’s* examples, it must ever be ancestrell on  
 the tenant’s side. And where *Littleton* putteth his case of an abbot  
 or prior, the same law is of a bishop, deane, archdeacon, prebend,  
 parson, vicar, and the like. Another thing here to be observed is,  
 that an abbot or prior cannot disclaime, &c. for regularly it is true,  
*quod meliorem conditionem ecclesie sue facere potent prelati, de-*  
*terioriorem nequaquam*; and againe, *ecclesie sue conditionem meliorem*  
*facere possunt sine consensu, deterioriorem non possunt sine con-*  
*sensu*. And therefore an abbot, prior, bishop, deane, arch- [103. a.]  
 deacon, prebend, parson, vicar, or any other sole corporation, that  
 is seised in *autre droit*, cannot disclaime; because as *Littleton* saith,  
 they alone cannot devest any fee which is vested in their house or  
 church. For the wisdom of the law would never trust one sole per-  
 son with the disposition of the inheritance of his house or church.  
 But an abbot and prior had their covent, the bishop his chapter, the  
 parson and vicar their patron and ordinarie, and the like of other  
 sole corporations, without whose assent they could passe away no  
 inheritance.

14 H. 6. 13.  
 3 H. 6. 9.  
 38. Am. p. 82.  
 37. Am. 6.  
 Co. 3. 73, &c.  
 Deane and  
 Chapter de  
 Norwich case.

40 E. 3. 37.  
 5 E. 4. 1.  
 6 E. 3. 51, 52.  
 (7. Co. 10, 11.)

10 E. 4. 2. a.  
 31 H. 7. 30.

6 E. 3. 51, 52.

“*Ils ne poient anienter ou devester chose de fee, &c.*” These gene-  
 rall words have certaine exceptions; for in a *quo warranto*, at the  
 suit of the king, against a bishop, abbot, or prior, for franchises and  
 liberties, if the bishop, abbot, or prior, disclaime in them, this should  
 binde their successors. If an abbot or prior had acknowledged the  
 action in a writ of annuitie, this should have bound the successour;  
 because

because he cannot falsifie it in an higher action, and there must be an end of suits. *Expedit reipublicæ, ut sit finis litium.* But if the abbot levie a fine, or acknowledge the action in a *præcipe quod reddat*, the successor shall be bound *pro tempore*, but he may have a writ of right, and recover the land.

“*Per force de homage ancestrall, &c.* Here (*&c.*) implyeth or by any other warrantie [*i*], as by the reason, which our author here yeldeth, appeareth.

“*Chose de fee.*” [*k*] For if in an action of debt upon an obligation against an abbot, the abbot acknowledgeth the action, and dieth, the successour shall not avoid execution, though the obligation was made without the assent of the covent; for he cannot falsifie the recovery in an higher action, *et res judicata pro veritate accipitur*, and this is but a chattell. And so it is of a statute or recognisance acknowledged by an abbot or prior.

38 E. 3. 33.  
16 E. 3. tit.  
Abbot 13.  
19 E. 3. tit.  
Abbot 13.  
7 R. 2. Abbot 7.  
13 H. 4. 11.  
30 H. 6. 10.  
ultimo. 4 H. 7. 2.  
2 H. 4. 6.  
34. Ass. p. 7.  
14 E. 4. tit.  
Abbot B.  
8 E. 3. 22.  
13 H. 8. 7.  
[f] 13 H. 8. 7.  
[k] 7 R. 2. tit.  
Abbot 7. See  
the bookes next  
above.  
(G. Co. 2. a.)

## Sect. 147.

**I**TEM, si home, que tient son terre per homage ancestrall, alien a un auter en fee, le alienee ferra homage a son seignior: mes il ne tient de son seignior per homage auncestrell; pur ceo que le tenancie ne fuit continue en le sanke de les auncesters l'alienee; ne l'alienee n'avera jammes garrantie de la terre de son seignior; pur ceo que le continuance del tenancie en le tenant et a son sanke per l'alienation est discontinue. Et sic vide, que si le tenant, que tient la terre per homage ancestrall de son seignior alien en fee, coment que il reprist estate de l'alienee arrere en fee, il tient la terre per homage, mes nemy per homage auncestrell.

**A**LSO, if a man, which holds his land by homage ancestrall, alien to another in fee, the alienee shall doe homage to his lord: but he holdeth not of his lord by homage ancestrall; because the tenancie was not continued in the blood of the ancestors of the alienee; neither shal the alienee have warrantie of the land of his lord; because the continuance of the tenancie in the tenant and to his blood by the alienation is discontinued. And so see, that if the tenant, which holdeth his land of his lord by homage ancestrall alieneth in fee, though he taketh an estate againe of the alienee in fee, yet he holds the land by homage, but not by homage ancestrall.

“**A**LIEN a un auter en fee.” For hereby the privy of the estate is altered, and the continuance of it in the blood of the tenant is dissolved. But if the tenant maketh a lease for life, or a gift in taile, this is a continuance of the privy and estate in the tenant in respect of the reversion that remaineth in him; for the fee, whereof *Littleton* heere speaketh, was not out of him. But if the tenant maketh a feoffment in fee upon condition, and dieth, his heire performeth the condition, and re-entreth, the homage ancestrall is destroyed in respect of the interruption of the continuance of the privy and estate; and this case was put and not denied in the argu-

(Post. 302. a.)

ment

[m] 1 Mich. 14  
& 15 Eliz.  
8 H. 7.

(F. N. B. 138.)

[n] 5 E. 3 per  
Cantrel.

[o] Britton, fol.  
170. a.

38 E. 3. 20.  
11 H. 4. 22.  
37 E. 3. 47.  
59. 73, 74.  
20 E. 3. 56.  
18 E. 3. 56.  
10 E. 3.  
Voucher 87.  
18 E. 3. 30.  
46 E. 3. Litt. fol. 160.

ment [m] of the case betweene the lord *Cromwell* and *Andrewes*, Mich. 14 & 15 Eliz. which I myselfe heard and observed. As if *cestuy que use* had made a feoffment in fee upon condition, and entred for the condition broken, he should have detained the land against the feoffees for ever, for that the estate and privitie was for the time taken out of the feoffees, and thereby dissolved for ever. But if the land were recovered against the tenant upon a faint title, and the tenant recover the same againe in an action of higher nature, there the homage auncestrell remaines; for the right was a sufficient meane for the continuance. So it is if he had reversed it in a writ of error. [n] If the alienee be impleaded in *Littleton's* case, and vouche the alienor that held by homage auncestrell, albeit he commeth in by fiction of law to many purposes in privitie of his former estate, yet to this purpose he cannot come in as tenant by homage auncestrell, because of the discontinuance of the estate and privitie, and as *Littleton* saith, the tenancie was not continued in the bloud. [o] And *Britton* saith, *et come ascun nequedent soit vouche per homage, et le seignior tende de averrer, quele tencement, dount il vouche, fuit translate hors del sanke del primer purchasor, per feoffment ou per ascun auter translation, en tiel case soit le tenant charger de vouchier son feoffor ou ses heires.*

"*Coment que il reprist estate del alienee en fee, &c.*" For the cause aforesaid, in respect of the interruption of the privitie and continuance of the estate. And herewith agreeth our bookes in cases of warranties in deed, or warranties in law. See more of this in the Chapter of Warranties.

## Sect. 148.

**I**TEM, il est dit, que si home tient sa terre de son seignior per homage et fealty, et il ad fait homage et fealty a son seignior, et le seignior ad issue fils, et devy, et le seigniorie descendist a le fils; en ceo cas le tenant, que fist homage al pere, ne ferra homage al fils; pur ceo que quant un tenant ad fuit un foits homage a son seignior, il est excuse pur terme de sa vie de faire homage a ascun auter heire del seignior. Mes uncore il ferra feallie al fils et heire le seignior, coment que il fist fealty a son pere.

**A**LSO, it is said, that if a man holds his land of his lord by homage and fealty, and he hath done homage and fealty to his lord, and the lord hath issue a son, and dies, and the seigniorie descendeth to the sonne; in this case the tenant, which did homage to the father, shall not doe homage to the sonne; because that when a tenant hath once done homago to his lord, he is excused for terme of his life to doe homago to any other heire of the lord. But yet he shall do fealtie to the sonne and heire of the lord, although he did fealtie to his father.

"*N*E ferra homage al fitz." If *A.* holdeth of *B.* as of the manor of *Dalc*, whereof *B.* is seised in taile; *B.* discontinueth the estate taile, and taketh backe an estate in fee simple; *A.* doth homage

homage to *B. B.* dieth seised, the issue in taile entreth; *A.* shall doe homage againe to the heire in taile of *B.* because he is remitted to the estate taile; and the state in fee that his father had, in respect whereof the homage is done, is vanished, and the heire in taile is in of a new estate, in respect whereof he ought to do a new homage. [h] But regularly it is true, which *Littleton* saith, that when a tenant hath done once homage to his lord, he is excused for terme of his life to make homage to any other heires of the lord. But he shall doe fealtie to his soune, albeit he hath done fealtie to the father.

(Post. 348. a.)

[d] Britton, 175, 176.

[104. a.]

Sect. 149.

**I**TEM, si le seignior, apres le homage a luy fait per son tenant, grant le service de son tenant per le fait a un auter en fee, et le tenant, attorna, &c. dunque le tenant ne serra my compel de faire homage. Mes il ferra fealty, coment que il fist fealtie devant a le grauntor; car fealtie est incident a chescun attournement del tenant, quant le seigniorie est graunt. Mes si ascun home soit seisie d'un mannor, et un auter home tient de luy la terre, come del mannor avant-dit per homage, lequel tenant ad fait homage a son seignior que est seisie del mannor; si apres un estrange port præcipe quod reddat envers le seignior del mannor, et recovers le mannor envers luy, et suist execution; en cest case le tenant ferra autrefois homage a celui, que recovers le manor, coment que il fist homage devant; pur ceo que l'estate celui, que recevoit le primer homage, est defalte per le recovery, et ne girra en le bouche le tenant a fauxer ou defeater le recovery, que fuit envers son seignior. Et sic vide diversitatem in ceo case, lou home vient a le seigniorie per recovery, et lou il vient per discent ou per graunt al seigniorie.

**A**LSO, if the lord, after the homage done unto him by the tenant, grant the service of his tenant by deed to another in fee, and the tenant attorneth, &c. the tenant shall not be compelled to doe homage. But he shall doe fealty, altho' he did fealty before to the grantor; for fealty is incident to every attournement of the tenant, when the seigniorie is granted. But if any man be seised of a mannor, and another holds of him the land, as of the mannor aforesaid by homage, which tenant hath done homage to his lord who is seised of the mannor, if afterwards a stranger bringeth a præcipe quod reddat against the lord of the mannor, and recovereth the mannor against him, and sues execution; in this case the tenant shall againe doe homage to him, which recovered the mannor, although he had done homage before; because the estate of him, which received the first homage, is defeated by the recovery, and it shall not lye in the power of the tenant to falsifie or defeat the recovery which was against his lord. And so see a diversitie in this case, where a man commeth to a seigniorie by recovery, and where he commeth to the same by discent or grant.

**I**TEM, si le seignior, &c. grant le service de son tenant per fait, &c." Note a diversitie, when the lord alieneth the seigniorie, and when the tenant alieneth the tenancy; for when the tenant hath done homage, and the seigniorie is transferred to another, either by the

Britton 176.  
13 E. 1. tit.  
Per que servitia  
22. & tit. Gar. 91.  
(8. Co. 102.)

[\*] 2 E. 4. 27. b.

the act of the party as alienation, or by act in law as descent, yet the tenant shall not iterate homage, as he shall do fealty; but when the tenant doth homage, and alieneth the tenancy, there is a new tenant, which never did homage, and therefore he ought to doe homage to the lord, albeit his alienor had done it before. And it is to be observed, that none shall doe [\*] homage, but the tenant of the land to the lords of whom it is holden; and therefore if homage be due to be done by the tenant, if the tenant alieneth the land to another, the alienor cannot be compelled to doe homage.

“Attorne, &c”. Here by (&c.) is to be understood, that albeit he pay his rent, performe his annual services, and doe fealtie, which is a part of homage, yet homage he shall not doe.

Vid. Sect. 351.  
33 E. 3.  
Arowrie 235.  
37 H. 6. 33.  
39 H. 6. 34.  
7 H. 7. 11.  
Doct. & Stud.  
fol. 45.  
28 H. 2. Dyer 41.

“*Mes si ascun home soit seisie d'un mannor, &c.*” Here it appeareth, that the case of the recovery of the seigniorie differeth from the alienation of the lord, which is his owne act, or the descent of the seigniorie to the heire, which is an act in law. And the reason of this diversitie is, for that by the recovery the state of him that received the homage is defeated; for it shall not lie in the mouth of the tenant to falsifie, or to frustrate or defeat the recovery, which was against his lord of the mannor or seigniorie, for that the tenant had [104. b.] nothing therein, and every man by law ought to meddle in such cases with that which belonged unto him, which is worthy of observation concerning falsifying of recoveries.

[5] 7 H. 8. cap. 4.

Note, that to falsifie, in legall understanding, is to prove false, that is, to avoyd, or, as *Littleton* here saith, to defeat, in *Latine falsare, seu falsificare, [i] falsum facere.*

[a] 39 H. 6. 22.  
37 H. 6. 24.  
26 H. 6. 22.

But since *Littleton* wrote, it is recited by act of parliament, that whereas divers, &c. have suffered recoveries against them of divers mannors, &c. for the performance of their wills, for the suretie of their wives joyntures, &c. and the recoverors had no remedy to compell the freeholders and tenants, &c. to attourne unto them, nor could by order of law attaine to the rents, services, &c. that act doth give the recoverors power to distreyn and avow; whereupon many have thought, that this doth impugne *Littleton's* case of the recovery. But *distinguidum est. Littleton* intendeth his case, either upon a recovery by title, (for he saith, that the state of the tenant in the recovery is defeated) or without any consent upon pretence of title, which is all one; for the tenant cannot falsifie, and the lord should avow as one that came in of a former title. And *Littleton* hath good authority in law to warrant [a] his opinion, and the statute of 7 H. 8. extendeth to common recoveries had by consent and agreement, as appeareth by the act itselfe, which then was, and yet is a common assurance and conveyance, whereof the law taketh notice, and whereupon (as appeareth by the act) an use might be limited. So as it is apparent, that such recoverors came in meerey under the state of the lord, &c. and had no remedy (as the statute saith) to compell the freeholders and tenants to attourne, and without attournement could neither distreyn nor avow. Wherefore this statute gave recoverors remedy to distreyn, and a forme to avow and justifie, which they had not before, as it appeareth by the *Doctor and Student*, who lived at that time. The bodie of the act is, *That such recoverors may distreyn and make avowrie, &c. as those persons against*



against whom the said recovery is, should have done, &c. if the same recovery had not been had, and have like remedie, &c.

If a man had made a lease for yeares to begin at *Michaelmas*, reserving a rent; and before *Michaelmas* he had suffered a common recovery, the recoveror should distreine for that rent, which the lessor before the recovery could not. But if the recovery had not beene had, then he might have distreyned, and so it is within the statute. But if a fine had beene levied of a manor, and before attournment the conusee had suffered a common recovery, the recoveror should not distreine, &c. because the conusee, against whom the recovery was had, could not.

28 H. 8. Dyer 41.

(Post. 215. a. 331. a.)

But this act extended onely to distresses and avowries for rents, services, and customes, and gave also a forme of a *quare impedit*. But upon this statute it was holden, that the recoveror could not have an action of debt against the lessee for yeares, nor an action of wast against tenant for life or yeares; and therefore remedy was provided in these cases, by the statute of 21 H. 8.

21 H. 8. cap. 15.

## Sect. 150.

**I**TEM, si un tenant, que doit per son tenure faire a son seignior homage, vient a son seignior, et dit a luy, sir jeo doy a vous faire homage pur les tenements que jeo teigne de vous, et jeo sue icy prist a vous faire homage pur mesmes les tenements; pur que jeo vous pry, que ore ceo voilles recevoir de moy.

**A**LSO, if a tenant, which ought by his tenure to doe his lord homage, commeth to his lord, and saith unto him, Sir, I ought to doe homage unto you for the tenements which I hold of you, and I am here ready to doe homage to you for the same tenements; and therefore I pray you, that you would now receive the same from me.

**"VIENT a son seignior."** The tenant ought to seeke the lord to doe him homage, if the lord be within *England*; for this service is personall as well of the lord's side as of the tenant's side, for law requireth order and decency. And therefore

[105. a.] *Bracton* saith, *et sciendum, quod ille, qui homagium suum facere debet, obtentu reverentie quam debet domino suo, adire debet dominum suum ubicunque inventus fuerit in regno, vel alibi si possit commodè adiri, et non tenetur dominus quærere suum tenentem, et sic debet homagium ei facere.* And the same law it is for fealty; and the diversity between these services and the rent is, because that these are personall, and the rent may be payd and received by other, and therefore a tender of the rent upon the land is sufficient.

*Bracton, fol. 80. a. And Britton, fol. 171. agreeth herewith.*

## Sect. 151.

**E**T si le seignior adanques refusa de ceo recevoir, douque apres tiel refusall le seignior ne poet distreiner le tenant pur le homage aderere, devant que le seignior requiroit le tenant de faire a luy homage, et le tenant a ceo faire refusa.

Vide Bracton,  
fol. 83.  
Briet. 171, 172.  
21 E. 3. 24.  
31 Ass. p. 73.  
20 E. 3.  
Avowry 223.  
45 E. 3. 9.  
7 E. 4. 4.  
31 E. 4. 17.  
20 H. 6. 31.  
(9. Co. 79.)

**A**ND if the lord shall then refuse to receive this, then after such refusall the lord cannot distreine the tenant for the homage behinde, before the lord requireth the tenant to doe homage unto him, and the tenant refuse to doe it.

**A**ND the reason hereof is, for that when the tenant hath done his endeavour and duty to offer his corporall service, and the lord refuseth the same, or doe not accept his service upon his tender thereof, (which is a refusall in law) then the law, in respect of the lord's fault, requireth, that before the lord can distreine for it, that he doth require the tenant to doe that service; and if he either refuse to doe it, or doe it not when he is required, it is a refusall in law.

## Sect. 152.

**I**TEM, home poit tener sa terre per homage auncestrel, et per escuage, ou per auter service de chevalier, auxi bien sicome il poyt tener sa terre per homage ancestrel en socage.

**A**LSO, a man may hold his land by homage auncestrell, and by escuage, or by other knights service, as well as he may hold his land by homage auncestrell in socage.

**S**O as homage ancestrell may belong as wel to a tenure by escuage or knights service, as to a tenure in socage, or to a tenure in nature of socage; whereof there hath somewhat been spoken in the Chapter of Socage (1).

(1) [See Note 110.]

## [105. b.] CHAP. 8. Grand Serjeantie.

## Sect. 153.

**T**ENURE per grand serjeantie  
*est, lou un home tient ses terres ou  
 tenements de nostre seignior le roy per  
 tiels services que il doit en son proper  
 person faire al roy; come de porter le  
 banner de nostre seignior le roy, ou sa  
 lance, ou de amesuer son hoste, ou  
 d'estre son marshal, ou de porter son  
 espee devant luy a son coronement, ou  
 d'estre son sewer a son coronement, ou  
 son carver, ou son butler, ou d'estre  
 un de ses chamberlains de le resceit  
 de son eschequer, ou de faire auters  
 tiels services, &c. Et la cause que tiel  
 service est appell grand serjeanty est,  
 pur ceo que il est plus grand et plus  
 digne service, que est le service en le  
 tenure d'escuage. Car celuy, que  
 tyent per escuage, n'est pas limite per  
 sa tenure de faire aucun plus especial  
 service que aucun auter, que tyent per  
 escuage, doit faire. Mes celuy, que  
 tient per grand serjeanty, doit faire  
 un especial service al roy, que il, que  
 tient per escuage, ne doit faire.*

**T**ENURE by grand serjeanty is,  
 where a man holds his lands or  
 tenements of our sovereign lord the  
 king by such services as he ought to  
 do in his proper person to the king,  
 as to carry the banner of the king,  
 or his lance, or to lead his army, or  
 to be his marshall, or to carry his  
 sword before him at his coronation,  
 or to be his sewer at his coronation,  
 or his carver or his butler, or to be  
 one of his chamberlains of the re-  
 ceipt of his exchequer, or to do  
 other like services, &c. And the  
 cause why this service is called grand  
 serjeanty is, for that it is a greater  
 and more worthy service, than the  
 service in the tenure of escuage.  
 For he, which holdeth by escuage,  
 is not limited by his tenure to do  
 any more especiall service then any  
 other, which holdeth by escuage,  
 ought to doe. But he, which  
 holdeth by grand serjeanty, ought  
 to doe some speciall service to the  
 king, which he, that holds by  
 escuage, ought not to doe.

**"TENURE per grand serjeanty."** Serjeanty commeth of the  
*French word (serjeant) i. satelles, and [a] serjeantie idem  
 est quod servitium. And it is called [b] magna serjeantia, or ser-  
 janteria\*, or magnum servitium, great service, as well in respect of  
 the excellency and greatnesse of the person to whom it is to be done  
 (for it is to be done to the king only) as of the honour of the service  
 itselfe; and so Littleton himselfe in this Section saith, that it is called  
 magna serjeantia, or magnum servitium, because it is greater and  
 more worthy than knights service, for this is revera servitium re-  
 gale, and not militare onely. Fleta saith, magna autem serjeantia  
 dici poterit, cum quis ad eundem cum rege in exercitu, cum equo  
 cooperto, vel hujusmodi, ad patrie tuitionem fuerit seoffatus.*

*"De nostre seignior le roy."* This tenure hath seven speciall  
 properties. 1. To be holden of the king only. 2. It must be done,  
 when the tenant is able, in proper person. 3. This service  
 is certaine and particular. 4. The reliefe due in respect of this tenure  
 differeth from knights service. 5. It is to be done within the realme (1).  
 6. It

[a] Glaw.  
 lib. 9. ca. 4.  
 [b] Bracton, lib.  
 2. 36. & 84, 85.  
 lib. 1. cap. 10.  
 \* Fleta, lib. 1.  
 cap. 10. lib. 2.  
 cap. 9. in fine.  
 [c] Britton, cap.  
 60. fol. 164, 165.  
 Oeksm cap. quod  
 non absoluitur.  
 45 E. 3. 21. per  
 Fineken. Fleta,  
 ubi supra.

Bracton, lib. 2.  
 84. 11 H. 4. 34.  
 10 H. 4.  
 Avowry 267.  
 F. N. B. 83.  
 10 H. 6. Ant.  
 Demesse 11.

6. It is subject to neither *aïd pur faire fitz chivaler*, or *file marier*, And 7. it payeth no escuage.

23 H. 3. tit.  
Gard. stat. de  
Ward. et Relev.  
28 E. 1.

"*Come de porter le banner de nostre seignior le roy, ou de amesner son host.*" This great service to the king may (as it appeareth hereby) concerne the warres and matters military; for some grand serjeanties are to be done in the time of war for [106. a.] the safety of the realme; and some in time of peace, for the honour of the realme.

(4 Inst. 122.)  
[\*] Flota, lib. 1.  
cap. 10.  
11 Eliz. Dier.  
245. Camd.  
Brit. 296. 287.  
[\*] Ockam, cap.  
Officium Constabularii.

"*Ou d'estre son marshall.*" [\*] If the king giveth lands to a man, to hold of him to be his marshall of his host, or to be marshall of *England*, or to be constable of *England*, or to be high steward of *England* [\*], chamberlayne of *England*, and the like, these are grand serjanties; and these and such like grand serjanties are of great and high jurisdiction, and some of them concerne matters military in time of war, and some services of honour in time of peace. And this is to be observed, that though there were divers lords marshalls of *England* before the reign of [z] R. 2. yet king R. 2. created *Thomas Mowbrey* duke of *Norfolke* the first earle marshall of *England* per nomen comitis marischalli Anglia.

[z] In Rot.  
Patent. de anno  
30 R. 2.

"*Ou de porter son espee, &c. ou d'estre son sewer a son coronement, &c.*" These and such like grand serjanties at the king's coronation are services of honour in time of peace.

(4 Inst. 106.)  
[a] Vid. 31 H. 3.  
statut. 8.  
16 E. 3. c. 11.  
14 E. 3. c. 14.  
26 H. 8. ca. 2.  
34 E. 3. H. 8. c. 16.  
11 E. 4. fo. 1.  
Pl. Com. 207, 208.  
[b] Ockam, cap.  
Quid sit Scaccarium.  
Gervanius  
Tilburienensis in  
Libro Nigro sub  
custodiâ camerariorum.

"*D'estre un de ses chamberlaines, &c. ou de faire auters tiels services.*" It is also a tenure by grand serjanty to hold [a] by any office to be done in person concerning the receipt of the king's treasure; *Quia thesaurus regis respicit regem et regnum; and census regius est anima reip.* Soit is *firmamentum belli, et ornamentum facis.*

*Milites camerarii dicuntur, quia pro camerariis ministrant; and concerning their office, this is the effect; as Ockam [b] saith, officium camerariorum in recepta consistit in tribus, scilicet, claves arcarum, &c. bajulant, pecuniam numeratam ponderant, et per centenas libras in formulas mittunt.* But discontinuance in effect hath worne out their office. And yet they continue their name, and keepe the keyes of the treasure where the records doe lye.

Rot. claus. 6 E. 1.  
memb. 1.

And another saith, *camerarius dicitur à camera, quia camera est locus in quem thesaurus recolligitur, vel conclave in quo pecunia reservatur.* So as *camerarius* in legall signification est *custos regii census*; and *Willielmus de Bellocampo comes Warwici* held *officium camerarii in scaccario.*

Ex lecturâ  
Marowe.

Or by any office concerning the administration of justice, *quia justitiâ firmatur solium.*

[c] Ex inquisitione post mortem  
Variani de Sancto  
Petro.  
4 E. 2. Cestr.  
Vid. 7. Ass. 12.  
7 E. 3. 67.

It appeareth by an ancient record, [c] that *Varianus de Sancto Petro tenuit de domino rege in capite medietatem serjantie facis per servitium inveniendi decem servientes facis ad custodiendam pacem in Cestriâ.*

See *Ockam* of the first institution and ancient order of the exchequer, *Dier* 4 *Eliz.* 213. the usherie of the exchequer holden by grand serjanty.

"*Tiels services, &c.*" Here by (*&c.*) is to be understood other like services not expressed, as partly appeareth by that which hath beene said, viz. to be steward of *England*, constable of *England* chamberlayne

chamberlayne of *England*, and other honourable services, whereof more shall be said in this Chapter.

“ *Ou un especiall service al roy.*” That is to say, that this great service be specially set downe; for it may consist of divers branches, as to goe with the king in his warre in the forward, and to returne in the reareward; and also to pay rent, &c. but yet it must be certaine and particular.

23 H. 3. Gard.  
142.

## Sect. 154.

**I**TEM, *si tenant que tient per escuage morust, son heire esteant de pleine age, s'il tenoit per un fee de chivaler, le heire ne paiera forsque c. s. pur reliefe, come est ordaine per le statute de Magna Charta, cap. 2. Mes si celui que tient de roy per* [106. b.] *grand serjeantie morust, son heire esteant de plein age, le heire paiera al roy pur reliefe le value de les terres ou tenements per an (ouster les charges et reprises) queux il tient del roy per grand serjeantie* (1). *Et est ascaroir, que serjeantia en Latin idem est quod servitium, et sic magna serjeantia idem est quod magnum servitium.*

**A**LSO, if a tenant which holds by es- (Ante 21. a.) cuage dyeth, his heire being of full age, if he holdeth by one knight's fee, the heire shall pay but a c. s. for reliefe, as is ordained by the statute of *Magna Charta*, c. 2. But if he which holdeth of the king by grand serjeanty, dieth, his heiro being of full age, the heire shall pay to the king for reliefe one yeares value of the lands or tenements which he holdeth of the king by grand serjeantie over and besides all charges and reprises. And it is to be understood, that *serjeantia* in Latine is the same *quod servitium*, and so *magna serjeantia* is the same *quod magnum servitium*.

“ *Paiera al roy pur reliefe de value de ses terres, &c.*” And 11 H. 4. 72. b. herewith agreeth 11 H. 4. 72. b.

“ *Serjeantia idem est quod servitium.*” Hereby it appeareth that the explanation of ancient words and the true sense of them are requisite, and to be understood *per verba notiora*.

## Sect. 155.

**I**TEM, *ceux, que tiegnont per escuage, doivent faire leur service hors de roialme; mes ceux, que tiegnont per graund serjeantie, pur le greinder part doivent faire leur services deins le roialme.*

**A**LSO, they, which hold by es- cuage, ought to doe their service out of the realme; but they, which hold by grand serjeantie, for the most part ought to doe their services within the realme.

(1) See as to reliefs ante 69. b. 76. a. 83. a.

“ *TENANTS*”

**T**ENANTS *per escuage* doivent faire leur service hors del roialme."

F. N. B. 83 E.  
(4 Co. 88.)

For he, that holdeth by cornage or castle-gard, holdeth by knights service, and is to doe his service within the realme; but he holdeth not by escuage; and therefore *Littleton* materially said tenant *per escuage*, and not tenant by knights service (2).

"*Pur le greinder part.*" For to bear the king's banner, or his lance, or to lead his host, and to be his marshall, &c. may be as well without the realme; and therefore *Littleton* said (for the greatest part).

## Sect. 156.

**I**TEM, il est dit, que en les marches de Scotland ascuns teignent de roy *per cornage*, c'estascavoir, pur rentier un cornu, per garnier homes de pais, quant ils oyent que le Scottes ou auters enemies teignent ou voilent enter en Engleterre; quel service est grand serjeanty. Mes si ascun tenant tient d'ascun auter seignor, que de roy, per tiel service de cornage, ceo n'est pas grand serjeantie, mes est service de chivaler, et truit a luy garde et marriage; car nul poit tener *per grand serjeanty* si non de roy tantsolement.

4 H. 5. cap. 7.  
23 E. 4. cap. 8.  
Camden in  
Britannia.

"**E**N les marches de Scotland." *Marches* is either a Saxon word, and signifieth *limites*, *bourdours*, or an *English* word, viz. *Markes*. *Nota*, for that it lyeth neere to *Scotland*, it is said in the marches of *Scotland*, and yet the land whereof *Littleton* here speaketh, lieth in *England* (1).

[107. a.]

"*Per cornage.*" *Cornagium* is derived (as *cornuare* also is) à *cornu*, and is as much (as before hath been noted (3)) as the service of the horne. It is also called in old bookes *hornfeld*.

26 H. 5. tit.  
Gard. 148.  
8 E. 3. 66.  
in fine. 16 E. 3.  
Avowrie 90.  
F. N. B. 83.

Note, a tenure by cornage of a common person is knights service, of the king it is grand serjeanty; so as the royall dignity of the person of the lord maketh the difference of the tenure in this case (4). And I find that there were *cornicularii* amongst the *Romans*; et dicti fuerunt *cornicularii* quia cornu faciebant excubias militares; and *magna serjeantia* is appropriated only to this tenure.

(2) [See Note 112.]

[107. a.]

(1) See further as to the *marches* of *Scotland*, 4 Inst. 281. and Nichols. *Leges March.*

(2) [See Note 113.]

(3) See ante 69. b.

(4) See post. 108. b. where for a like reason a service, which if it was to be done to a subject would be *socage*, is distinguished by the denomination of *petit serjeanty*.

Sect.

## Sect. 157.

**I**TEM, home poit veier anno 11 H. 4. que Cokayne, adonque chiefe baron d'eschequer, vient en le common banke, portant ovesques luy la copie d'un recorde in hæc verba. Talis tenet tantam terram de domino rege per serjeantiam, ad inveniendum unum hominem ad guerram ubicunque infra quatuor maria, &c. Et il demaunda, s'il fuit graund serjeanty, ou petite serjeantie. Et Hanke adonques disoit, que il fuit graunde serjeantie; pur ceo que il ad service a faire per corps d'un home, et s'il ne purra trover nul home a faire le service pur luy, il mesme doit faire. Quod alii justitiiarii concesserunt. Cokaine dunque, Doit le tenant en ceo cas paier reliefe al value de terre per an? Ad quod non fuit responsum.

**A**LSO, a man may see in anno 11 H. 4. that Cokayne, then chiefe baron of the exchequer, came into the common place, and brought with him the copy of a record in these words. *Talis tenet tantam terram de domino rege per serjeantiam, ad inveniendum unum hominem ad guerram ubicunque infra quatuor maria, &c.* And he demanded, if this were grand serjeanty, or petite serjeanty. And Hanke then said, that it was grand serjeanty; because he had a service to do by the bodie of a man, and if he cannot find a man to doe the service for him, he himselfe ought to do it (5). *Quod alii justitiiarii concesserunt.* Then saith Cokaine, Ought the tenant in this case to pay reliefe to the value of the land by the yeare? *Ad quod non fuit responsum.*

**E**T s'il ne purra trover nul home a faire le service pur luy, &c." Hereby it appeares, that tenant by grand serjeantie may in some cases make a deputy; and therefore the diversitie is, that where the grand serjeanty is to be done to the royall person of the king, or to execute one of those high and great offices, there his tenant cannot make a deputie without the king's licence; and therefore *Littleton* hath said before that such services are to be done in proper person. But he that holdeth to serve him in his warre within the realme or by cornage, may make a deputie.

[\*] *Johannes de Archier qui tenet de domino rege in capite per serjeantiam archerie, &c. in comitatu Glouc. hæres in custodiâ.*

"*Infra quatuor maria.*" That is, within the kingdome of *England*, and the dominions of the same kingdome (6).

Now it is good to be seene what persons that hold by grand serjeantie may doe and performe that honourable service in person, and

[107. b.] who ought not to be received thereunto, but ought to make a sufficient deputy. At the coronation of [a] king *R. 2. John Wilsheire* citizen of *London* exhibited his petition to the high steward of *England* in his court, that where the said *John* held certain lands in *Hayden* in the county of *Essex* of the king by grand serjeantie, viz. to hold a towell when the king should wash his hands before dinner the day of his coronation, &c. and prayed that he might be accepted to doe this office of grand serjeantie, the judgment

11 H. 4. 78.  
24 E. 3. 32.  
Vide Hill. 6 E. 1.  
Midd. inter Ple-  
cita de Banco,  
Sir John Mayne's  
case.

11 H. 4. 78.

[\*] Claus. 18.  
H. 2. m. 7.

Rot. Escheator.  
41 H. 3. nu. 23.  
Stephen Haring-  
don's case.

[a] 1 R. 2. Rot.  
Claus. m. 46

(5) [See Note 114.]

(6) [See Note 115.]

ment followeth. *Et quia apparet per record' de Scaccario domini regis incurid monetrat' quòd prædicta tenementa tenentur de domino rege per servitium prædictum, ideo dictus Johannes admittitur ad servitium suum hujusmodi faciendum per Edmondum comitem Cantabrigia deputatum suum, et sic idem comes in jure ipsius Johannis manutergium tenuit, quando dominus rex lavabat manus suas dicto die coronationis sue ante prandium.*

By which record it appeareth, that the said *John Wilsheire*, being of his quality and having not any dignity, could not doe and performe this high and honorable service to the royall person of the king, but did make an honorable deputy, who performed it in his right ; which is worthy of observation.

Vid. 1. R. 2.  
membr. 45.

At the same coronation *William Furnevall* exhibited his petition in the same court, that where he held the mannor of *Parnham*, in the county of *Buck*, with the hamlet of *Cere* in the same county, by the service to find to the king at his coronation a glove for his right hand, and to support the king's right hand the same day, while he held in his hand the verge royall, the judgement followeth. *Quòd quidem petitione debite intellectâ, et factâ publicè proclamatione, si quia clameo ipsius Willielmi in eâ parte contradicere vellet, nemineque ei contrariante, consideratum fuit, quòd idem Willielmus, assumpto per eum primitivâ ordine militari, ad servitium prædictum admitteretur faciendum ; et postmodo (videlicet) die Martis proximo ante coronationem prædictam dominus rex ipsum Willielmum apud Kenington honorificè præfecit in militem, et sic idem Willielmus servitium suum prædictum dicto die coronationis, juxta considerationem prædictam, perfecit et in omnibus adimplevit.* By which it appeareth, that a knight is of that dignity, that he may performe this high and honorable service in his owne person ; and although this *William Furnevall* was descended of an honorable family, yet before he was created knight he could not performe it.

And sir *John de Argentine*, chevalier, performed the service of grand serjeanty, to be the king's cap-bearer at the same coronation.

[m] Vid. 1. R. 2.  
m. 45.

[m] *Anne*, which was the wife of sir *John Hastings* earle of *Pembroke*, who held the mannor of *Ashley* in *Norfolke* of the king by grand serjeantie, viz. to performe the office of the naspery at his coronation, was adjudged to make a deputy, because a woman cannot doe it in person ; and thereupon she deputed sir *Thomas Blount*, knight, who performed the same in her right. *John*, sonne and heire of *John Hastings* earle of *Pembroke*, exhibited in the same court his petition, shewing that by his tenure he was to carrie the great spurres of gold before the king at his coronation, &c. The judgement is, *Auditâ et intellectâ billâ prædictâ, pro eò quòd dictus Johannes est infra ætatem et in custodia domini regis, quanquam sufficienter ostenditur per recorda, et evidencias, quòd ipse servitium prædictum facere deberet, consideratum extitit, quòd esset ad voluntatem regis, quis dictum servitium istâ vice in jure ipsius Johannis faceret ; et super hoc dominus rex assignavit Edmundum comitem Marchie ad deferendum dicto die coronationis prædicta calcarta in jure præfati heredis, salvo jure alterius cujuscunque.* Et sic idem comes *Marchie* calcarta illa prædicto die coronationis coram ipso domino rege deferbat. By which it appeareth, that the heire, before he hath accomplished his age of one and twenty yeares, cannot performe his great and honourable service, but during the minoritie the king shall appoint one to performe the service.

Vid. 1 R. 2. m. 45.



## Sect. 158.

**E**T nota, que tous que teignent de roy per grand serjeanty, teignent de roy per service de chevalrie; et le roy pur ceo avera garde, mariage, et reliefe; mes le roy n'averá de eux escuage, s'ils ne teignent de luy per escuage.

**A**ND note, that all which hold of the king by grand serjeanty, hold of the king by knights service; and the king for this shall have ward, marriage and reliefe; but he shall not have of them escuage, unlesse they hold of him by escuage.

[108. a.] **H**ERE Littleton saith, that he, that holds by grand serjeantie, doth hold by knights service, which is so said of the effects. And therefore Littleton doth add, that the king shall have ward marriage and reliefe, which are the effects of knights service, &c.

46 E. 3. 15. a.  
per Fincham.

Sometimes in ancient records, *servitium militare* is called *servitium hauberticum*, or *servitium brigandinum*, or *servitium lorica-tum*. And a *haubert* or *brigandine* signifieth a coat of maille (1).

(Ante 24. a.)

(1) [See Note 116.]

## CHAP. 9.

## Petit Serjeantie.

## Sect. 159.

**T**ENURE per petit serjeanty est  
*lou home tient sa terre de nostre  
 seignior le roy, de rendre al roy un-  
 nualment un arke, ou un espee, ou un  
 dagger, ou un cuttel, ou un launce,  
 ou un paire de gants de ferre, ou un  
 paire de spoures d'ore, ou un sele, ou  
 divers setes, ou de rendre autres tiels  
 petit choses touchans le guerre.*

**T**ENURE by petite serjeanty is,  
 where a man holds his land of  
 our sovereigne lord the king, to  
 yeeld to him yearly a bow, or a  
 sword, or a dagger, or a knife, or a  
 lance, or a paire of gloves of maile,  
 or a paire of gilt spurs, or an arrow,  
 or divers arrowes, or to yeeld such  
 other small things belonging to  
 warre.

Britton, fol. 164.  
 Bracton, lib. 2.  
 fol. 36. Fleta,  
 lib. 2. cap. 9.  
 Ockham, cap.  
 Quid de avibus  
 oblatio.  
 (6 Co. 6.)

**D**E nostre seignior le roy." And so Littleton concludeth this Chapter, that a man cannot hold by grand serjeanty or petite serjeanty but of the king, and of the king as of his person, and not of any honour or manor (2). And it is to be observed, that regularly a tenure of the king as of his person is a tenure *in capite*, so called *propter excellentiam*; because the head is the principall part of the body, and he that holdeth of any common person as of his person, he in truth holdeth *in capite*; but againe *it is only in common understanding applyed to the king, and that seigniorie of a common person is called a tenure in grosse, that is, by itselfe, and not linked or tied to any mannor, &c.*

[a] Bracton, lib.  
 2 fol. 87.  
 (3 Ro. Abr. 804.)  
 [b] 3 E. 3.  
 1. mures B. 94.  
 30 H. 8. 43.  
 28 H. 8.  
 Liverie B. 87.  
 20 H. 8. ibid.  
 28. 6 H. 8.  
 Dier 58. Vide  
 Le statute de  
 1 E. 6. cap. 4.  
 F. N. B. 3. K.  
 (3 Ro. Abr. 73,  
 73.)

And this tenure of the king *in capite*, is said [a] to be a tenure of the king as of his crowne, that is, as he is king. [b] And therefore if one holdeth land of a common person in grosse as of his person, and not of any mannor, &c. and this seigniorie escheateth to the king (yea though it be by attainder of treason) he holdeth of the person of the king, and not *in capite*; because the originall tenure was not created by the king. And therefore it is directly said, that a tenure of the king *in capite*, is when the land is not holden of the king as of any honor, castle, or mannor, &c. but when the land is holden of the king as of his crowne (3).

Note, that an honor is the most noble seigniorie of all others, and originally created by the king, but may afterward be granted to others. See for the creation of an honor, 13 H. 8. cap. 5. 33 H. 8. cap. 37, 38. 37 H. 8. cap. 18. (4).

And it is to be observed, that a man may hold of the king *in capite*, or of his crowne, as well in socage, as by knight's service (5).

Magna Chart.  
 cap. 27.

**"De rendre al roy annualment un arke, ou un espee, &c."** As grand serjeanty must be done by the body of a man, so petite serjeanty hath nothing to do with the body of a man, but to render some things touching warre; as a bow, a sword, a dagger, a knife, a lance, a pair of gantlets of iron, or shafts, and such like.

Regist. fo. 2.  
 F. N. B. fo. 1.

It is to be observed, that grand serjeanty or knights service is not in law called *liberum servitium*, as socage is, but *per feodum unius militie, &c.* But to finde the king so many ships for his passage is called *liberum servitium*; and therefore it is said [108.b.]

per

(2) [See Note 117.]

(3) [See Note 118.]

(4) [See Note 119.]

(5) [See Note 120.]

*per liberum servitium, ad inveniendum nobis quinque naves ad transitum nostrum ad mandatum nostrum.* And therefore cleerly such a tenure is neither grand serjeanty, nor knights service; because nothing is to be done by the body of any man, nor in that case touching war, but ships to be found. And this is the reason that *I tittleton* yeeldeth of the examples he doth here put, because that such a tenant by his tenure ought not to go, nor to doe any thing in his person, touching war. And herewith agreeth *Bracton*, *ex parvis serjeantiis, quæ non respiciunt regem nec patriæ defensionem, nullum competere debet maritagium nec custodiam, &c.*

*Bract. li. 2.  
fo. 36.*

9 H. 2. Gard. 145.

If a man holdeth land of the king, to finde an horse of such a price and a saddle and a bridle by forty dayes, or any other time when the king goeth with his army against *Wales*, this is petite serjeanty, and no grand serjeanty, for the cause aforesald.

## Sect. 160.

**E**T tiel service ne est forsque socage en effect; pur ceo que tiel tenant per son tenure ne doit aler, ne fuyre ascun chose, en son proper person, touchant le guerre, mes de render et payer annualment certaine choses al roy, sicome home doyt payer un rent.

**A**ND such service is but socage in effect; because that such tenant by his tenure ought not to goe, nor do any thing, in his proper person, touching the warre, but to render and pay yearly certaine things to the king, as a man ought to pay a rent.

**"T**IEL service n'est forsque socage, &c." But as it hath beene said, the dignity of the person of the king giveth the name of petite serjeanty; which in case of a common person should be called plain socage, *ab effectu*; for it shall have such effects or incidents as belong to socage, and neither ward nor marriage, &c. for they belong to knights service.

9 H. 3. Gard. 145.

Of this tenure the Great Charter in the person of the king saith thus: *Nos non habebimus custodiam hæredis, &c. occasione alicujus parvæ serjeantie, quam tenet de nobis per servitium reddendo nobis cultellos, sagittas, &c.*

*Mag. Chart.  
ca. 28.  
Vid. Stat. de  
Wardis & Releviis  
28 E. 1.*

## Sect. 161.

**E**T nota, que home ne poyt tener per graund serjeantie, ne per petit serjeanty, sinon de roy, &c.

**A**ND note, that a man cannot hold by grand serjeanty, nor by petite serjeanty, but of the king, &c.

**O**F this sufficient hath beene sayd before, saving that *parva serjeantia* is only appropriate to this tenure (1).

Vide Sect. 1.

(1) [See Note 121.]

## CHAP. 10.

## Tenure en Burgage.

## Sect. 162.

**T**ENURE en burgage est, lou an-  
tient burgh est, de que le roy est  
seignior, et ceux, que ont tenements  
deins le burgh, teignent del roy leur  
tenements; que chescun tenant per  
son tenement doit payer al roy un  
certain rent per an, &c. Et tiel te-  
nure n'est forsque tenure en socage.

**T**ENURE in burgage is, where  
the king is lord, and they, that have  
tenements within the burrough, hold  
of the king their tenements; that  
every tenant for his tenement ought  
to pay to the king a certaine rent  
by yeare, &c. And such tenure is  
but tenure in socage.

Bracton, lib. 3.

1 tract. 2.

Britton, fol. 164.

Mirror, cap. 2.

sect. 18.

19 Co. 123, 124 the

Mayor of Lynn's Case.

"**B**URGAGE," in Latine *burgagium*, is derived of this word  
*burgus*, which is *vicus*, *pagus*, or *villa*, a towne (2); and it  
is called a burgh (3), because it sendeth burgesses to parliament (4).

40 Am. p. 27. 43 E. 3. 32. 21 E. 4. 53. & 54. 21 H. 7. 15. 2 E. 3. cap. 3.

[6] Bracton, lib.

3 fol. 124.

Fleta, lib. 1.

cap. 47.

Of burghs some be incorporate, and some not; and some be  
walled, and some not. [6] It was in former times taken  
for those companies of ten families, which were one ano- [109. a.]  
ther's pledge; and therefore a pledge is in the Saxon tongue *borhoe*,  
whereof some take it that a burgh came; whereof also commeth  
headborough or borowhead, *capitalis plegius*, a chiefe pledge, viz.  
the chiefe man of the borhoe, whom Bracton calleth *frithburgus*;  
and hereof also commeth burgbote, which, as Fleta saith, signifieth  
*quietantium reparationis murorum civitatis aut burgi*.

Every city is a burgh, but every burgh is not a city; whereof  
more shall be said hereafter. And the termination of this word  
*burgagium* (as before hath been noted), signifieth the service where-  
by the burgh is holden. And of this word (*burgh*) two ancient and  
noble families take their names, viz. *de Burgo*, and *de Burgo caro*,  
*Burchier*.

F. N. B. 64. d.

"*De que le roy est seignior.*" But it may be holden of another,  
as by that, which immediately followeth, appeareth.

## Sect. 163.

**E**T mesme le manner est, lou un  
auter seignior espiritual ou tem-  
porall est seignior de tiel burgh, et  
les tenants de tenements en tiel burgh  
teignent de leur seignior a payer,  
chescun de eux, un annual rent.

**A**ND the same manner is, where  
another lord spirituall or tem-  
porall is lord of such a burrough,  
and the tenants of the tenements in  
such a borough hold of their lord  
to pay, each of them yearly, an  
annual rent.

(2) For the difference between *town* and  
*borough*, see post. 115. b.

(3) For the etymology of *borough*, besides  
Spelman, Du Fresne, and the other glossa-

rists, see Whitl. on Parliam. 497. Brad. on  
Bor. 1. and Mad. Firm. Burg. 2.

(4) [See Note 122.]

**T**HIS is evident, and needeth no explanation. Only this by the way is to be observed, that bishops, being lords of parliament, have not been called lords spirituall so lately as some have imagined.

16 R. 2. ca. 5.  
1 H. 4. ca. 2. &c.

## Sect. 164.

**E**t est appel tenure en burgage, pur ceo que les tenements deins le burgh sont tenus del seigniør del burgh per certaine rent, &c. Et est ascavoire, que les antient villes appel burgh, sont les plus antient vills que sont deins Engleterre; car ceux villes, que ore sont cities ou counties, en antient temps fueront burghes, et apelles burghes; car de tielx ancient villes apelles burghes, veignont les burgesses al parliament, quant le roy ad summon son parliament (1).

**A**ND it is called tenure in bur-  
gage, for that the tenements within the burrough be holden of the lord of the burrough by certaine rent, &c. And it is to wit, that the ancient townes, called burroughes be the most ancient towns that be within England; for the townes that now be cities or counties, in old time were boroughes, and called boroughes; for of such old townes called boroughes come the burgesses of the parliament to the parliament, when the king hath summoned his parliament.

**P**ER certaine rent, &c." By (&c.) here is implied fealty, or other service, as to repaire the house of the lord, &c.

"Les ancient villes appel burghes."

So as a burgh is an ancient towne, holden of the king or any other lord, which sendeth burgesses to the parliament.

And it is to be observed, that *Burgh* and *Burie* have all one signification; as *Canterburie*, *Burie Saint Edmond*, *Sudburie*, *Salisbury*, *Banburie*, *Heytesburie*, *Malmesburie*, *Shaftesburie*,  
[109. b.] *Tenkesbury*, and others send burgesses to the parliament.  
*Vide pro villis, parochiis et hamlettis, postea, Section 171.*

"*Cities*," *Civitas*, whereof commeth the word city. A city is a borough incorporate (2); which hath or have had a bishop; and though the bishopricke be dissolved, yet the city remaineth.

In the time of *William the Conquerour* it is declared in these words:  
*Item nullum mercatum vel forum sit, nec fieri permittatur, nisi in civitatibus regni nostri, et in burgis clausis et muro vallatis, et castellis, et locis tutissimis, ubi consuetudines regni nostri, et jus nostrum commune, et dignitates, coronæ nostræ, quæ constitutæ sunt à bonis predecessoris nostris, deperire non possunt, nec d. fraudari, nec violari, sed omnia ritè et per judicium et justiciam fieri debent: et ideo castella et burgi et civitates sunt et fundatæ et edificatæ; scilicet ad iuvitionem gentium et populorum regni, et ad defensionem regni, et idcirco observari debent cum omni libertate et integritate et ratione.*  
So as by this it appeareth, that cities were instituted for three purposes. First, *Ad consuetudines regni nostri, et jus nostrum commune,*  
et

Lamb. fol. 125.

(1) See ante 108. b. note 4.

(2) [See Note 123.]

*et dignitates coronæ nostræ conservandæ. 2. Ad tuitionem gentium et populorum regni.* And thirdly, *Ad defensionem regni.* For conservation of laws, whereby every man enjoyeth his owne in peace; for tuition and defence of the king's subjects; and for keeping the king's peace in time of sudden uprores; and lastly, for defence of the realme against outward or inward hostility.

Mirror, cap. 2.  
sect. 18.  
Britton, fol. 87.

*Civitas et urbs in hoc differunt, quod incolæ dicuntur civitas, urbs verò complectitur ædificia;* but with us the one is commonly taken for the other. *Villeins sont coultivers de fief demurrants in villages upland; car de ville est dit villeine, et de boroughes burgesses, et de citiees citizens.*

Mish. 7 R. 1.  
Rot. 1. (which was  
in Anno Dom.  
1194) in an Ass. of  
Darreine Present-  
ment for the  
Church of St.  
Peter's in  
Cambridge.

Every borough encorporate, that had a bishop within time of memory, is a citie, albeit the bishopricke be dissolved; as *Westminster* had of late a bishop, and therefore it yet remains a city. (3). The burgh of *Cambridge*, an ancient citie, as it appeareth by a judiciall record (which is to be preferred before all others) where *mos civitatis Cantabrigiæ* is found by the oath of twelve men, the recognitors of that assise; which (omitting many others) I thought good to mention, in remembrance of my love and duty *alma matri academæ Cantabrigiæ*.

There be within *England* two archbishoprickes, and twenty-three other bishoprickes. Therefore so many cities there be; and *Cambridge* and *Westminster* being added, there are in all twenty-seven cities within this realme, and may be more, than at this time I can call to memory.

It is not necessary that a citie be a county of itselfe; as *Cambridge*, *Ely*, *Westminster*, &c. are cities, but are no counties of themselves, but are part of the counties where they be.

(Post. 168. a.)

"Counties," or Shires; the one taken from the *French*, the other from the *Saxon*, in *Latine Comitatus*. Counties are certaine circuits or parts of the kingdome, into the which the whole realme was divided for the better government thereof, so as there is no land but it is within some county. And every of them is governed by a yearly officer, which we call a Shireve; which name is compounded of these two *Saxon* words *shire* and *reve* [i.e.] *prefpositus* or *prefectus comitatûs*. But hereof more hereafter in his proper place shall be spoken. There be in *England* forty-one counties, and in *Wales* twelve.

10 Co. 123, 124.  
Vid. devant  
Sect. 97.

"*Veignent les burgesses al parliament, &c.*" Parliament is the highest and most honourable and absolute court of justice in *England*, consisting of the king, the lords of parliament, and the commons. And againe, the lords are here divided into two sorts, viz. spirituall and temporall. And commons are divided into three parts, viz. into knights of shires or counties, citizens out of cities, and burgesses out of burroughes; the words of the writ to the sherife for the election being, *duos milites gladiis cinctos magis idoneos et discretos comitatûs tui, et de quâlibet civitate comitatûs tui duos cives, et de quolibet burgo duos burgenses de discretioribus, et magis sufficientibus, &c.* all which have voyces and suffrages in parliament. You shall reade in the parliament rolls, that (as hath bene said) there is *lex et consuetudo parliamenti, quæquidem lex quærenda est ab omnibus, ignorata à nullis, et cognita à paucis*. Of the mem-  
bers

Vide Sect. 3.  
(4. Inst. 2.)

bers of this court some be by descent, as ancient noblemen ; some by creation, as nobles newly created ; some by succession, as bishops ; some by election, as knights, citizens, and burgesses.

It is called parliament, because every member of that court should sincerely and discreetly *parler la ment* (1) for the general good of the common wealth ; which name it hath also in *Scotland* (2) ; and this name before the Conquest was used in [a] the time of *Edward the Confessour*, *William the Conquerour*, &c. (3). It was anciently before the Conquest called *micel sinoth*, *micel gemote*, *ealsa witena gemote* ; that is to say, the great court or meeting of the king and of all the wisemen, sometime of the king with the counsell of his bishops nobles and wisest of his people. This court the *Frenchman* calleth *les estates*, or *l'assemblee des estates*. In *Germany* it is called a *diet*. For those other courts in *France* that are called parliaments, they are but ordinary courts of justice ; and (as *Paulus Jovius* affirmeth) were first established by us.

The king of *England* is armed with divers counsels, one whereof is called *commune concilium*, and that is the court of parliament, and so it is legally called in writs and judicial proceedings *commune concilium regni Angliæ*. And another is called [b] *magnum concilium* : this is sometime applied to the upper house of parliament, and sometime out of parliament time to the peeres of the realme, lords of parliament, who are called *magnum concilium regis* ; for the prooffe whereof take one [c] record for many in the fift yeare of king *H. 4.* at what time there was an exchange made betweene the king and the earle of *Northumberland*, whereby the king promiseth to deliver to the earle lands to the value, &c. *per advice et assent des estates de son realme et de son parliament* (*fiarensi que parliament soit devant le feast de St. Lucy*) ou autrement *per advice de son graund counsell, et auters estates de son realme, que le roy ferra assembler devant le dit feast, in case que le parliament ne soit*. And herewith agreeth the act of parliament in 37 *E. 3.* cap. 18. where it is said before the chancellour treasurer and great counsell. (4) Thirdly (as every man knoweth), the king hath a privy counsell for matters of state ; (as for example) [d] *Henricus de Bello-monte baro de magno et de privato concilio regis juratus*, and many others before and after. The fourth counsell of the king are his judges of the law for law matters ; and this appeareth frequently in our [e] bookes ; and must be intended, when it is spoken generally by the counsell, it is to be understood *secundum subjectam materiam* ; for example, if it be legall, then by the king's counsell of the law, viz. his judges (5).

Now for the antiquity of this high court of parliament, whereof *Littleton* here speaketh, it appeareth, that divers parliaments have beene holden long before and untill the time of the Conqueror, which be in print, and many more appearing in ancient records and manuscripts (6). [f] *Le Roy Alfred assembler les countees, &c. et ordeina pur usage perpetual, que deux fois per an ou plus souvent pur mister in temps de peace se assemblerent a Londres, a parlermenter sur le guidement del peoble de Dieu, et coment soy garderont de pecher, vivront en quiet, et receiveront droit per usage et sanits judgements. Per ceste estatut se fieront plusors ordonances per plusors roys j'esque a temps*

4 H. 2. cap. 8.  
[a] *Treatis de Modo tenend. Parliam.*  
21 E. 3. fo. 60. a.  
Johannes de Rupicella tempore regis Johannis.  
Pol. Virgil. li. 3. tempore H. 1.  
W. 1. 3 E. 1. in the title.  
(Doct. & Stud. 164.)  
3 Inst. 125. 179.  
4 Inst. 83.)

[b] Bracton, lib. 1. cap. 2.  
Regist. 280.

[c] 27 Aug.  
6 H. 4.

[d] In dors.  
Claus. 16. E. 2.  
m. 5.  
(7 Co. 36.)

[e] 43 Ass. 18.  
27 H. 6. 5.  
1 R. 3. 11.  
Regist. 191.  
123. 123.  
4 E. 3. 2.  
39 E. 3. 35.  
3 Ass. 15.  
19 E. 3. Jugement  
174. W. 1. ca. 1.  
Lestat. de Temp.  
plar. 16 R.  
2. Stat. de Frémunire.  
See the same published by Mr. Lambard.  
[f] Mirror, ca. 1. sect. 2. Vide Statutes de 4 E. 3. ca. 14. &c.  
36 E. 3. ca. 10.

(1) [See Note 125.]  
(2) [See Note 126.]  
(3) [See Note 127.]

(4) [See Note 128.]  
(5) [See Note 129.]  
(6) [See Note 130.]

*temps le roy que ore est, que fuit le roy E. 1.* The conclusion of that great parliament holden by king *Ethelstan* at *Grately* is very remarkable, which I have seene in these words. *All this was enacted in that great synod or counsell at Grately, whercat was the archbishop Wolvehelme, with all the noblemen and wise men, which king Athelstan called together.*

There have beene in the time of, and since the Conquest, in the reignes of *H. 1.* king *Stephen H. 2. R. 1.* king *John, H. 3.* &c. 280 sessions of parliament, and at every session divers acts of parliament made, no small number whereof are not in print (7).

The jurisdiction of this court is so transcendent, that it maketh, enlargeth, diminisheth, abrogateth, repealeth, and reviveth lawes, statutes, acts, and ordinances, concerning matters ecclesiasticall, capitall, criminall, common, civill, martiall, maritime, and the rest. None can begin, continue, or dissolve the parliament, but by the king's authority. Of which court it is said, [a] *Que il est de tres grand honor et justice, de que nul doit imaginer chose dishonorable.* [b] *Habet rex curiam suam in concilio suo in parliamentis suis, presentibus prelatibus, comitibus, baronibus, proceribus, et aliis viris peritis, ubi terminatæ sunt dubitationes judiciorum, et novis injustis emeris nova constituuntur remedia, et unicuique justitia prout meruerit retribuetur ibidem.* But this properly doth belong to the jurisdiction of courts, and therefore this little taste hereof shall suffice.

## Sect. 165.

[110. b.]

**I**TEM, pur le greinder part tielx burghes ont divers customes et usages, que n'ont pas auters villes. Car ascuns burghes ont tiel custome, que si home ad issue plusors firs et morust, le puisne firs enheritera tous les tenements que fueront a son pere deins mesme le burgh, come heire a son pere per force de custome; et tiel custome est appel burgh English.

**A**LSO, for the greater part such boroughes have divers customes and usages, which be not had in other towns. For some boroughes have such a custome, that if a man have issue many sonnes and dyeth, the youngest son shall inherit all the tenements which were his father's within the same borough, as heire unto his father by force of the custome; the which is called borough English (1).

"**C**USTOMES et usages." *Consuetudo* is one of the maine triangles of the lawes of *England*; those lawes being divided into common law, statute law, and custome. Of which it is said, [\*] that *consuetudo quandoque pro lege servatur in partibus, ubi fuerit more utentium approbata, et vicem legis obtinet; longævi enim temporis usus et consuetudinis non est vilis autoritas.* [c] *Longa possessio (sicut jus) parit jus possidendi, et tollit actionem vero domino.*

Of every custome there be two essentiall parts, time and usage; time out of minde, (as shall be said hereafter) and continuall and peaceable usage without lawfull interruption.

"Que

(7) See Pref. to Ruffhead's Stat. 21.

[110. b.]

(1) [See Note 131.]

Mirr. ca. 2. sect.  
4. 7. 10. 14. ca.  
4 de Defaults, &c  
cap. de Homicide,  
cap. 1. sect.  
13. cap. 4. de  
Poym. Ockam  
quid cum Ven.  
Moth. Paris.  
212, 213.

[a] Pl. Com.  
392. b. Doctor  
& Stud. ca. 55.  
fol. 164.  
[b] Fleta, lib. 2.  
ca. 2. Fortescue  
de Laudibus  
Legum Angliæ.  
Bract. lib. 1.  
ca. 2.  
(Doctor & Stud.  
33.)

(Post. 115. b.)  
[\*] Bract. lib. 1.  
ca. 3. fol. 2.

[c] Idem, lib. 2.  
fol. 52.  
(Dav. 33. a.)



"*Que n'ont pas au'res villes.*" It is necessary to be knowne what customes may be alledged in an upland towne, which is neither citie nor borough. [\*] In an upland towne, that is neither city nor borough, such a custome to devise lands cannot be alledged. Neither in an upland towne can there be a custome of borough *English* or gavelkinde; but these are customes, which may be in cities or boroughes. [d] Also, if lands be within a mannor fee or seigniorie, the same by the custome of the mannor fee or seigniorie may be devisable, or of the nature of gavelkinde or borough *English*. [\*] But an upland towne may alledge a custome to have a way to their church, or to make by-lawes for the reparations of the church, the well ordering of the commons, and such like things. And it is to be observed, that in special cases a custome may be [c] alledged within a hamlet, a towne, a burgh, a city, a mannor, an honor, an hundred, and a county; but a custome cannot be alledged generally within the kingdome of *England*; for that is the common law (2).

"*Le puisme fils inheritera.*" And yet by some customes the youngest brother shall inherit; for *consuetudo loci est observanda* (3).

"*Toutes les terres ou tenemens:*" Either in fee simple, fee taile, or any other inheritance. If lands of the nature of borough *English* be letten to a man and his heires during the life of *I. S.* and the lessee dyeth, the youngest sonne shall enjoy it (4).

"*Borough English:*" So called, because this custome was first (as some hold) in *England* (5).

(Doct. Plac. 104.  
8 Co. 84. a.)

[\*] 44 E. 3. 33.  
40 Ass. 4. 37. 41.  
21 E. 4. 54.  
43 B. 2. 32.

[d] 21 E. 4. 53, 54.  
(6 Co. 80. b.)

[\*] 21 E. 4. 54.  
15 E. 4. 29.  
11 H. 7. 14.  
44 E. 3. 18.  
21 H. 7. 40.

[c] Bract. lib. 4.  
271. 34 E. 1.  
Detinue 60.  
17 E. 2. Detinue  
58. 3 E. 2.  
Det. 150.  
30 E. 3. 25.  
39 E. 3. 6. 9. 10.  
31 E. 3. Render  
6. 17 E. 3. 27.  
21 E. 4. 33.  
23 E. 4. 8.  
7 E. 3. 51.  
30 E. 3. 23.  
34 H. 2. Dier  
54 F. N. B. 122.  
5 E. 3. Trespass. 13.  
Vid. Glanvil. lib.  
7. ca. 3. 9.

## Sect. 166.

**I**TEM, en ascun burghes, per le custome, feme avera pur sa dower tous les tenemens que fueront a sa baron, &c.

**A**LSO, in some boroughes, by custome, the wife shall have for her dower all the tenements which were her husband's.

**A**ND this is called frank banke, *francus bancus*. *Consuetudo est in partibus illis, quod uxores maritorum defunctorum habeant francum bancum suum de terris sockmannorum tenet' nomine dotis.*

Bract. lib. 4.  
Tract. 6. ca. 13.  
F. N. B. 180. a.  
Pl. Com. 413.  
(Ante 33. b.)

[111. a.] "*Que fueront a sa baron, &c.*" Here is implied by (5c.) that in some places the wife shall have the moiety of the lands of her husband, so long as she lives unmarried; as in gavelkinde. And of lands in gavelkinde a man shall be tenant by the curtesie without having of any issue. (1) In some places the widow shall have the whole, or halfe, *dum sola et casta vixerit*, and the like.

10 E. 3. Aide. 129.

(2) [See Note 132.]

(3) [See Note 133.]

(4) [See Note 134.]

(5) See as to the denomination of Borough

English and the subject in general, Append. to Robins. Gavelk.

[111. a.]

(1) [See Note 135.]

## Sect. 167.

**I**TEM en ascuns burghes, per le custome, home poit deviser per son testament ses terres et tenements, que il ad en fee simple deins mesme le burgh al temps de son morant; et per force de tiel devise, celui a que tiel devise est fait, apres le mort le devisor, poit entrer en les tenements issint a luy devisees, a aver et tener a luy, solonque la forme et effect del devise, sans aucun liverie de seisin d'estre fait a luy, &c. (4)

**A**LSO, in some boroughs, by the custome, a man may devise by his testament his lands and tenements, which he hath in fee simple within the same borough at the time of his death; and by force of such devise, he to whome such devise is made, after the death of the devisor, may enter into the tenements so to him devised, to have and to hold to him, after the forme and effect of the devise, without any liverie of seisin thereof to be made to him, &c.

(3 Co. 73. b.)

**“DEVISER.”** This is a *French* word, and signifieth *sermocinari* to speake, for *testamentum est testatio mentis, et index animi sermo* (2). So as a *deviser per son testament* is to speake by his testament, what his minde is to have done after his decease.

[m] Vide Sect. 58.

**“Per son testament.”** *Testamentum est [m] duplex. 1. In scriptis. 2. Nuncupativum, seu sine scriptis.* And in some cities and boroughes, lands may [n] passe as chattels by will nuncupative or paroll without writing (3). *Revera [o] terminatum est, quoddam potest legari, ut catallum, tam hereditas, quam perquisitum, per barones London' et burgenses Oxon. Ideo verum est, quoddam in burgis non jacet assisa mortis antecessoris.* But in law most commonly *ultima voluntas in scriptis* is used, where lands or tenements are devised, and *testamentum* when it concerneth chattels.

4 E. 3. 53.  
7 H. 4. 1.  
14 H. 8. 5.  
22 Am. 78.  
Abbr. Ass. 118. b.  
4 E. 2. Mortdane.  
39.  
49 E. 3. 17.  
F. N. B. 190.  
21 H. 6. 38. a.  
7 E. 2. tit. Mortdane.

**“Ses terres ou tenements.”** And by the same custome he may devise a rent out of the same lands and tenements (5).

**“Que il ad en fee simple.”** For lands in taile are not devisable by will; and therefore he in this place necessarily added (*que il ad en fee simple*) and purposely omitted the same in the clause concerning borough *English*; because there an estate taile is included.

F. N. B. 190.  
Regist. in ex gravi  
Quercia.  
(10. Co. 46.)

**“Poit entrer.”** Note, the custome of a city or borough concerning the devise of lands is, *quoddam liceat unicuique civi sive burgensi, &c. ejusdem civitatis sive burgi tenementa sua in eadem civitate sive burgo in testamento suo in ultima voluntate sua, tanquam catalla sua, legare cuicunque voluerit, &c.* [p] Now if a man deviseth, either by speciall name or generally, goods or chattels reall or personall, and dyeth, the devisee cannot take them without the assent of the executors (6). But when a man is seised of lands in fee, and deviseth the same in fee, in taile, for life, or for yeares,

[p] 2 H. 6. 16.  
27 H. 6. 8.  
3 E. 4. 13.  
21 E. 4. 21.  
4 H. 7. 16.

(2) See ante fol. 110. a. note 1.

(3) [See note 136.]

(4) The &c. is not in L. and M.

(5) [See Note 137.]

(6) Acc. Perk. sect. 488. 570. and 572. to 576. The other authorities relative to this doctrine will be found in Vin. Abr. *Devise*, A. a. and Com. Dig. *Administration*, C. 5.

yeares, the devisee shall enter ; for in that case the executors have no meddling therewith. And in the case of a devise by will of lands, whereof the devisor is seised in fee, the freehold or interest in law is in [g] the devisee before he doth enter, and in that case nothing [r] (having regard to the estate or interest devised) descendeth to the heire. But if the heire of the devisor entreth and holdeth the devisee out, he may either enter as *Littleton* here saith, or have his writ called *ex gravi querela* ; and this writ (without any particular usage) is incident to the custome to devise ; for otherwise, if a descent were cast before the devisee did enter, the devisee should have no remedy. After an actual possession this writ lyeth not ; for then the devisee may have his ordinary remedy by the common law.

[111. b.] And well said *Littleton*, that lands and tenements were devisable in burghes by custome ; for that [s] at the common law no lands or tenements were devisable by any last will and testament, (1) nor ought to be transferred from one to another, but by solemne livery of seisin, matter of record, or sufficient writing (2); but as *Littleton* here saith, that by certain private customes in some burghes they are devisable. But now since *Littleton* wrote, by the statutes of 32 and 34 H. 8. lands and tenements are generally devisable (3) by the last will in writing of the tenant in fee simple, whereby the ancient [t] common law is altered, whereupon many difficult questions, and most commonly disherison of heires (when the devisors are pinched by the messengers of death) doe arise and happen. But [u] these statutes take not away the custome to devise, (4) whereof *Littleton* speaketh : for though lands devisable by custome be holden by knights service, yet may the owner devise the whole land by force of the custome, and that shall stand good against the heire for the whole. But the devise of lands holden by knights service by force of the statutes is utterly void for a third, and the same shall descend to the heire. If he hath any lands holden by knights service *in capite*, and lands in socage, he can devise but two parts of the whole ; but if he hold lands by knights service of the king, and not *in capite*, or of a meane lord, and hath also lands in socage, he may devise two parts of his land holden by knights service, and all his socage lands. If he holds any land of the king *in capite*, and by act executed in his life-time he conveyeth any part of his lands to the use of his wife or of his children, or payment of his debts, though it be with power of revocation, he can devise by his will [x] no more, but to make up the land so conveyed two parts of the whole. And if the lands so conveyed amount to two parts or more, then he can devise nothing by his will. But if he hath land onely that is holden in socage, then he may devise by his will all his socage land ; so as it is apparent, that the benefit of the lords was more carefully provided for, than the good of the heire.

But if a man, holding some land of the king by knights service *in capite*, convey two parts of his land to the use of his wife for life, now (as hath beene said) he can devise no part of the residue, but yet he may by his will devise the reversion of the two parts so conveyed to his wife : for the intention of the act is to give power to dispose of two parts intirely.

[g] 4 Mar. Br. tit. Devise 49.  
[r] Regist. fol. 244.  
39 Am. pl. 6.  
3 E. 3. Devise 12. 30. Am. 31.  
34 E. 3. tit. Formedon. Pl. postr. 30 H. 8. Devise 28.  
F. N. B. 198, 199, &c.  
Britton, fol. 312. b. (Post. 240. b. Cro. Cha. 301. 1 Sid. 191.)  
[s] 27 H. 8. cap. 10.  
Britton, fol. 312. 78. b. 164.  
Vide before in this Sect.  
32 H. 8. cap. 2.  
34 H. 8. ca. 5.

[t] Vide 3. Co. 26, &c. in Butler and Baker's case.  
6 Co. 16. & 76.  
8 Co. 84, 85.  
9 Co. 133.  
10 Co. 82, 83, 84. 11. Co. 24.  
1 Co. 25. a.  
[u] Dier 4. & 5 Phil. & Mar. 155. an. 6 Eliz. Dalison, Pasch. 20 Eliz. betweene Barber, and his wife plaintiff ; and William Long defendant in a writ of partition. Bendloe's adjudged.  
(9 Co. 133.)

[x] 6 Co. 17, 18. sir Edward Clere's case.  
3 Co. 34. b. Butler and Baker's case.

10 Co. 80, 81. Leon. Lovey's case.  
Leon. Lovey's case, and Butler and Baker's case ubi supra.

If

(1) [See Note 138.]  
(2) See note 1. above.

(3) [See Note 139.]  
(4) [See Note 140.]

If the devisor leave a full third part of the land immediately to descend in fee simple or in taile, he may devise the other two parts in fee simple. If a third part be not left, it shall be made up according to the act. But hereditaments, that are not of any yearely value, as *bona et catalla felonum et fugitivorum*, waifes, estrayes, and the like, can neither be left to descend for any part of the third part, or devised as part of the two parts. But yet if such franchises of uncertaine value be holden of the king *in capite*, they shall re-straine the devise of all his lands, and make it void for a third part. So it is if a man hath a reversion expectant upon an estate taile dry and fruitlesse holden of the king by knights service *in capite*, yet that shall restraine him to devise but two parts of his lands only. And where the statute speaks of a remainder, it is to be intended only of such a remainder as may draw ward and mariage by the common law. As if a reversion upon a state for life be granted to one for life, the remainder in fee, during the life of the grantee for life it is not within the statute; but if he dyeth, this is such a remainder as is within the statute, although it be dry and fruitles. If a gift in taile or a lease for life be made, the remainder in fee, this remainder in fee is not within the statute. But if a man hath lands holden by knights service *in capite* in possession, reversion, or remainder, and is also seised of socage land, and devise by his will all his lands, and after he selleth away the *capite* land, or that land is recovered from him, the will is good for the whole socage land. The values both of the third part and the two parts of the lands shall be taken as they happen to be at the time of the death of the devisor; for then his will takes effect.

(1 Sid. 86.)  
Leon. Lovey's  
case, ubi supra,  
fol. 61.

3 Co. 84, 85.  
Sir Richard Pex-  
hall's case.  
3 Co. 53. Butler  
and Baker's case.

6 Co. 17, 18.  
in Sir Edward  
Clerc's case.  
(6 Co. 173.)  
Port. 271.  
Cro. Cha. 38.)

He that holds by knights service in chiefe, deviseth by his will a rent, common, or other profits as shall amount to the value of two parts out of all his lands: this rent issueth only out of the two parts, and the third part is free of it. And if he hath lands holden by knights service, and not *in capite*, he may charge two parts of the knights service land as is aforesaid, and all his socage land, &c. And if he hath onely socage land, he may by his will charge it at his pleasure, so as the king's and lord's third part is free, and the heire's two parts charged; and this is only by force of the statute of 34 H. 8.

If a man make a feoffment in fee of his lands holden by knights service to the use of such person and persons, and of such estate and estates, &c. as he shall appoint by his will, in this case, by operation of law the use and state vests in the feoffor, and he is seised of a qualified fee. In this case, if the feoffor limit estates by his will, by force, and according to his power, there the uses and estates growing out of the feoffment are good for the whole, and the last will is but directory. (5) But in that case, if the feoffor had devised the land (as owner thereof) without any reference to the feoffment and power thereby given then taking effect by the will, it is void for a third part. But if he had formerly conveyed two parts to the use of his wife, &c. and after devised the residue by his will without any reference to his power by the feoffment, yet this will shall en-  
[112. a.]  
sure to declare the use upon the feoffment, because he had no  
power as owner of the land to devise any part of it. (1) But if the feoffment had been made to the use of his last will, although he deviseth the  
land

(5) Adjudged acc. in Mytton and Lut-  
wich, W. Jo. 7.

[112. a.]  
(1) [See Note 141.]

land with reference to the feoffment, yet it taketh effect only by the will, and not by the feoffment. (2) All which and many other points of intricate and abstruse learning you shall more largely read in my Reports.

(M. 200.)

"*Sauns aucun liverie de seisin d'estre fait a luy, &c.*" For in his life time livery of seisin could not be made, because his will is ambulatorie till his death, and no estate passeth during his life; neither can livery be made after his decease, for then it cometh too late.

40. Ass. 32.

Here (*&c.*) (3) implyeth, that the devise is good without any attornment of any lessee or tenant.

## Sect. 168.

**N**OTA, coment que home ne poit grant, ne doner, ses tenements a sa feme, durant le couverture, pur ceo que sa feme et luy ne sont forsque un person en ley; uncore per tiel custome il poit deviser per testament ses tenements a sa feme, a aver et tener a luy en fee simple, ou en fee taile, pur terme de vie, ou per terme des ans, pur ceo que tiel devise ne prist effect forsque apres la mort le devisor; car tous devises ne preignent effect forsque apres la mort le devisor. Et si home fait a divers temps divers testaments, et divers devises, &c. uncore le darrein devise et volunt fait per luy estoiera, et l'auters sont voides (5).

**A**LSO, though a man may not grant, nor give, his tenements to his wife, during the couverture, for that his wife and he be but one person in the law; yet by such custome he may devise by his testament his tenements to his wife, to have and to hold to her in fee simple, or in fee taile, or for tearme of life, or yeares, for that such devise taketh no effect but after the death of the devisor. And if a man at divers times makes divers testaments, and divers devises, &c. yet the last devise and will made by him shall stand, and the others are voyd.

"**H**OME ne poit grant, ne doner, ses tenements a sa feme, &c." This opinion is [a] cleere, for by no conveyance at the common law a man could during the couverture, either in possession, reversion, or remainder, limit an estate to his wife. But a man may by his deed covenant with others to stand seised to the use of his wife, or make a feoffment or other conveyance to the use of his wife; and now the state is executed to such uses by the statute [b] of 27 H. 8. for an use is but a trust and confidence, which by such a mean might be limited by the husband to the wife. But a man cannot covenant with his wife to stand seised to her use; because he cannot covenant with her, for the reason that *Littleton* here yeeldeth (4).

[a] 4 H. 7.

[b] 27 H. 8.  
cap. 10.  
(Stat. 111.  
Dy. 105. a.  
2. Ro. Abr. 788.)

"*Durant le couverture.*" That is, during the continuance of the marriage. For to cover in *English* is *tegere* in *Latine*, and is so called, for that the wife is *sub potestate viri*, and she is disabled to contract

(2) [See Note 142.]

(3) See note 4. of fol. 111. a.

(4) See further on this subject ante note

1. fol. 3. a.

(5) The words *et l'auters sont voides* are not in L. and M. Roh. nor P.



cedent à son heire; uncore les ex-  
ecutors, apres le mort leur testator,  
poyent vender les tenements issint a  
eux devises, et ouster l'heir, et ont  
faire feoffment, alienation et estate  
per fait, ou sans fait, a eux a queux  
le vend est fait. Et issint pois veier  
icy un cas, ou home poit faire loial  
estate, et uncore il n'avoit riens en les  
tenements al temps del estate fait.  
Et la cause est, pur ceo que la custome  
et usage ad este tel (1). Quia con-  
suetudo, ex certa, causa rationabili  
usitata, privat communem legem.

second unto his heire; yet the ex-  
ecutors, after the death of the testy-  
tor, may sell the tenements so de-  
vised to them, and put out the  
heire, and thereof make a feoffment,  
alienation and estate by deed, or  
without deed, to them to whom the  
sale is made. And so may ye here  
see a case, where a man may make  
a lawful estate, and yet he hath  
nought in the tenements at the time  
of the estate made. And the cause  
is, for that the custome and usage  
is such. For a custome, used upon  
a certain reasonable cause, depriveth  
the common law.

“**Q**UE ses executors poient aliener ou vender ses tenements.”  
And that, which in *Littleton's* time a man might doe by  
custome, in some particular places, he may now doe by the  
statutes of 32 and 34 H. 8. generally.

“*Les executors apres le mort leur testator poient vender.*” Here  
it appeareth that the executors having but a power, as *Littleton* put-  
teth the case, to sell, they must all joyn in the sale. Then put the  
case, that one dies, it is regularly true, that being but a bare autho-  
ritie, the survivors cannot sel. But if a man deviseth his land to *A.*  
for terme of life, and that after his decease his lands shall be sold by  
his executors generally, (as *Littleton* here putteth his case) and  
make three or four executors, and during the life of *A.* one of the  
executors dieth, and then *A.* dieth, the other two or three execu-  
tors may sell, because the land could not be sold before, and the  
plurall number of his executors remains. But if they had beene  
named by their names, as by *I. S. I. N. I. D.* and *I. G.* his exe-  
cutors, then in that case the survivors could not sell the

[113. a.] same, because the words of the testator could not be satis-  
fied; and I myself knew this case adjudged. [\*] A speciall verdict  
was found, that *A.* was seised of certayne lands in fee, and devised  
the same in taile; and if the donee died without issue, that his said  
land should be sold by his sons in law, he in truth having five sons in  
law. One of his sons in law died in the life of the donee, and after  
the donee dyed without issue, and then the foure of the sonnes in  
law sold the land, and it was adjudged that the sale was good, be-  
cause they were named generally by his sonnes in law, and the  
lands could not be sold by them all; and the words of the will in a  
benigne interpretation are satisfied in the plurall number, albeit that  
they had but a bare authority: but if they had been particularly  
named, it had been otherwise. But if a man deviseth lands to his  
executors to be sold, and maketh two executors, and the one dieth,  
yet the survivor may sell the land; because as the state, so the trust  
shall survive; and so note the diversity betweene a bare trust, and a  
trust

32 H. 8. cap. 2.  
34 H. 8. cap. 5.

40 E. 3. 26.  
20. Ass. 17.  
29. Ass. 26.  
9 H. 6. 26.  
15 H. 7. 12. 21.  
14 H. 8. 6.  
30 H. 8. 26.  
Devise Br. 31.  
2 Eliz. Dyer 177.  
(3. Co. 16.  
1. Ro. Abr. 326.  
Mo. 61. 66. 147.  
Cro. Cha. 323.)

(1. Co. 173.)  
[\*] Hill. 20 El.  
Inter Vincent &  
Lee in the  
King's Bench.  
(Cro. Eliz. 23.  
1. Leon. 264.  
Mo. 147.  
3. Co. 68.  
Cro. Cha. 298.  
1. Ro. Abr. 323.)

39. Ass. p. 17.  
4 Eliz. Dier 216.  
23 Eliz. Dier  
371. Pasch.  
23 Eliz. Ro.  
1307. in Com-  
muni Banco,  
and so resolved  
in Vincent's case.  
(1. Sid. 5 Post.  
151. b. 236. a.  
214. b.)

(1) &c. in L. and M.

[a] 1. Co. 123.  
In Digges's case.

trust coupled with an interest. In both those cases the executors may [a] sell part of the land at one time, and part at another, as they may finde purchasers.

(3) 21 Ed. 3. cap. 4.

In *Littleton's* case admit that one executor had refused to sell, then, as the law stood when *Littleton* wrote, it was cleare that the others could not sell. But now by the statute [b] of 21 H. 8. it is provided, that where lands are willed to be sold by executors, that though part of them refuse, yet the residue may sell. And albeit the letter of the law extendeth only where executors have a power to sell, yet being a beneficiall law, it is by construction extended where lands are devised to executors to be sold. Yet in neither of those cases, albeit one refuse, can the other make sale to him that refused, because he is party and privy to the last will, and remains executor still. Mine advice to them that make such devises by will, to make it as certaine as they can, is, that the sale bee made by his executors or the survivors or survivor of them, if his meaning be so, or by such or so many of them as take upon them the probate of his will, or the like. And it is better to give them an authority than an estate; unlesse his meaning be, they should take the profits of his lands in the meane time; and then it is necessary that he deviseth, that the meane profits till the sale shall be assets in their hands, for otherwise they shall not be so. But hereof thus much shall suffice (2).

(1. Leon. 66.)  
Tr. 27 H. 8. in  
the Common  
Place, Sergeant  
Mendillo's Report.  
(1. Hol. Abr. 328.)  
1. Leon. 67. 224.)

49 E. 3. 16.  
28. Am. 3.  
30. Am. 17.  
13 E. 3. Devise  
3. 14 H. 3. 20.  
15 H. 7. 12. b.  
(9. Co. 77. a.)  
19 H. 6.  
(1. Leon. 31.)

"*Et est faire feoffment.*" For albeit the executors in this case have no estate or interest in the land, but only a bare and naked power, yet this feoffment amounteth to an alienation, to vest the land in the feoffee, as it appeareth here, and the feoffee shall be in by the devisor.

"*Per fait ou sans fait.*" And therefore if by the custome a man deviseth, that a reversion or any other thing that lyeth in grant shall be sold by the executors, they may sell the same without deed (3); for the vendee shall be in by the devisor, and not by the executors, as hath beene said.

"*Consuetudo ex certa causa rationabili usitata privat communem legem.*" Quia consuetudo contra rationem introducta potius usurpatio quam consuetudo appellari debet. Consuetudo prescripta et legitima vincet legem.

4 E. 4. 4.  
11 H. 4. 7.  
30 H. 6. 30.  
7 H. 6. 1. 2.  
9 H. 6. 26.  
8 H. 7. 4.  
8 Elin. Dier 267.  
(2. Hol. Abr. 306.)  
4. Inst. 274. 275.  
303.)

"*Privat communem legem.*" For no custome or prescription can take away the force of an act of parliament (4); and therefore *Littleton* materially speaketh here of the common law.

(2) [See Note 146.]

(3) The case cited in the margin from

19 H. 6. is in fo. 23.

(4) See 115. a.



## Sect. 170.

**E**T nota, que nul custome est allowable, mesque tiel custome, que ad est use per title de prescription, scil. de temps dont memorie ne curt. Mes divers opinions ont este de temps dont memory, &c. et de title per prescription, que est tout un en ley. Car ascuns ont dit, que temps de memory serra dit de temps de limitation en un brieve de droit: scilicet, de temps le roy R. le 1. puis le Conquest, come est donec per le statute de Westminster 1. pur ceo que le brieve de droit est le plus haut brieve, en sa nature, que poit estre. Et per tiel brieve home poit recover son droit de la possession son auncestors de puis auncient temps, que home purroit per ascun brieve per le ley, &c. Et entant que il est donec per le dit estatute, que en brieve de droit nul soit oye a demander de le seisin son auncestors del puis longe temps que de temps le roy R. avantdit, issint ceo est prove, que continuance de possession, ou auters customes et usages uses puis le dit temps, est le title, de prescription, &c. Et hoc certum est. Et auters ont dit, que bien et verity est, que seisin et continuance puis le dit limitation (1) est un title de prescription, come est avantdit, et pur cause avantdit. Mes ils ont dit, que il y auxy un auter title de prescription, que fuit a la common ley devant ascun estatute de limitation, de brieve, &c. et ceo fuit, lou un custome, ou un usage, ou auter chose, ad este use de temps dont memorie des homes ne curt a le contrarie. Et ils ont dit, que il est prove per le pleder un title de prescription de custome (2). Il dirra, que tiel custome ad este use de tempore ejus contrarium memoria hominum non existit, et ceo est autant a dire, quant tiel matter est plede, que nul home adonque en vie ad oye ascun prooffe a  
le

**A**ND note, that no custome is to bee allowed but such custome, as hath bin used by title of prescription, that is to say, from time out of minde. But divers opinions have beene of time out of minde, &c. and of title of prescription, which is all one in the law. For some have said, that time out of mind should bee said from time of limitation in a writ of right; that is to say, from the time of king Richard the first after the Conquest, as is given by the statute of Westminster the first, for that a writ of right is the most high writ in his nature, that may be. And by such a writ a man may recover his right of the possession of his ancestors of the most ancient time, that any man may by any writ by the law, &c. And in so much that it is given by the said estatute, that in a writ of right none shall be heard to demand of the seisin of his ancestors of longer time than of the time of king Richard aforesaid, therefore this is proved, that continuance of possession, or other customs and usages used after the same time, is the title of prescription, &c. And this is certaine. And others have said, that well and truth it is, that seisin and continuance after the limitation, &c. is a title of prescription, as is aforesaid, and by the cause aforesaid. But they have sayd, that there is also another title of prescription, that was at the common law before any estatute of limitation of writs, &c. and that it was, where a custome, or usage, or other thing, hath beene used, for time whereof mind of man runneth not to the contrary. And they have said, that this is proved by the pleading, where a man will plead a title of prescription of custome.

(1) &amp;c. in L. and M. Roh.

(2) &amp;c. in L. and M. and Roh.

*le contrary, ne avoit aucun conusans a le contrary: et entant que tiel titre de prescription fuit a le common ley, et nient ouste per aucun estatute, ergo, il demurt come il fuit a le common ley; et le plus tost, entant que la dit limitation de brieve de droit (3) est de cy long temps passe (4). Ideo de hoc quere. Et plusors auters customes et usages ont tiels ancient burghes.*

*ergo, it abideth as it was at the common law; and the rather, insomuch that the said limitation of a writ of right is of so long time passed. Ideo quere de hoc. And many other customes and usages have such ancient boroughes.*

(4. Co. Luttrel's case. 9. Co. 87.  
2. Rol. Abr. 355, 356.  
1. Sid. 161.  
1. Rol. Abr. 500, 506.  
Cro. Cha. 178.)  
(4. Co. 86.)

**"PRESCRIPTION."** Prescription is a title taking his substance of use and time allowed by the law. *Prescriptio est titulus ex usu et tempore substantiam capiens ab auctoritate legis.* In the common law a prescription, which is [113. b.] personal, is for the most part applied to persons, being made in the name of a certain person and of his ancestors, or those whose estate he hath; or in bodies politique or corporate and their predecessors; for as a naturall body is said to have ancestors, so a body politique or corporate is said to have predecessors. And a custome, which is locall, is alledged in no person, but layd within some manor or other place. As taking one example for many. *I. S.* seised of the manor of *D.* in fee prescribeth thus: that *I. S.* his ancestors, and all those whose estate he hath in the sayd manor, have time out of minde of man had and used to have common of pasture, &c. in such a place, &c. being the land of some other, &c. as pertaining to the sayd manor. This properly we call a prescription. A custome is in this manner. A copyholder of the manor of *D.* doth plead, that within the same manor, there is and hath beene such a custome time out of mind of man used, that all the copyholders of the said manor have had and used to have common of pasture, &c. in such a wast of the lord, parcell of the said manor, &c. where the person neither doth or can prescribe, but alledgeth the custome within the manor. But both to customes and prescriptions, these two thing are incidents inseparable, viz. possession or usage, and time. Possession must have three qualities: it must be long, continual, and peaceable; *longa, continua, et pacifica*: for it is said, *transferantur dominia, sine titulo, et traditione, per usucapionem, acil. per longam, continuam, et pacificam possessionem. Longa, i. e. per spatium temporis per legem definitum*, of which hereafter shall be spoken. *Continuam dico, ita quod non sit legitime interrupta. Pacificam dico, quia si contentiosa fuerit, idem erit quod prius, si contentio fuerit justa. Ut si verus dominus, [114. a.] statim cum intruor vel discesor ingreus fuerit scissinam, nitatur, tales viribus repellere, et expellere, licet id quod incepit perducere non possit ad effectum, dum tamen cum defecerit, diligens sit ad impetrandum et proseguendum. Longus usus nec per vim, nec clam, nec precario, &c.*

If a man prescribeth to have a rent, and likewise to take a distresse for the same, it cannot bee avoyded by pleading, that the rent hath beene alwayes payd by cohercion, albeit it began by wrong.

"Un

(3) *Ec.* in L. and M. Roh.

(4) *Ec.* in L. and M. and Roh.

(6. Co. 60. a.  
64. b. 64.)  
13 E. 4. 1, 2.  
Marle. Br.  
Prescr. 180.  
6 E. 6. Dy. 71.  
14 R. 2. Bar. 277.  
43 E. 3. 32.  
7 H. 6. 25.  
23 H. 6. 14.  
16 F. 2. 34.  
Prescript. 53.  
22. Am. 2.  
40. Am. 37. 41.  
21 E. 4. 53, 54.  
(9. Co. 87.)

Direct. fo. 51, 52.

Repet. fo. 52. b.

13 E. 4. 6.

"*Un titre de prescription.*" Seeing that prescription maketh a title, it is to be scene; first, to what things a man may make a title by prescription without charter; and secondly, how it may be lost by interruption.

For the first, as to such franchises and liberties as cannot be seized as forfeited, before the cause of forfeiture appeare of record, no man can make a title by prescription, because that prescription being but an usage *in pais*, it cannot [\*] extend to such things as cannot bee seized, nor had, without matter of record: as to the goods and chattels of traitors, felons, felons of themselves, fugitives, of those that be put in exigent, deodands, censuance of pleas, to make a corporation, to have a sanctuary, to make a coroner, &c. to make conservators of the peace, &c. (1).

(Dr. & Stud. 14.  
3 Co. 72.)  
21 H. 6.  
Prescript. 48.  
21 H. 6. 5.  
1 H. 7. 20.  
9 H. 7. 11. 20.  
7 H. 6. 45.  
6 H. 6. 22. 23.  
46 H. 3. 16.  
3 H. 4. 20.  
9 Co. 59.  
Dor. Pleas. 703.  
3 Roll. Abr. 370.  
[\*] Pleas. 1.  
cap. 25.  
(Post. 195. a. 3 Roll.

Edw. 2. c. 12. 40 Ass. p. 2. 40 E. 3. 2. Statut. Pl. Cor. 21. 70. 3 Co. 109, 110. 9 Co. 59. (Post. 195. a. 3 Roll. Abr. 114. 265.) (3 Ro. Abr. 370. 9 Co. 59. Post. 195. a.)

[c] But to treasure trove, waifes, estraies, wrecke of sea, to hold pleas, courts of leets, hundreds, &c. infange thiefe, outfange thiefe, to have a parke, warren, royall fishes; as whales, sturgions, &c. fayres, markets, franke foldage, the keeping of a gadle, tolle, a corporation by prescription, and the like, a man may make a title by usage and prescription only without any matter of record. [\*] *Vide* Sect. 310. where a man shall make a title to lands by prescription.

But it is to be observed, [f] that although a man cannot, as is aforesaid, prescribe in the said franchise to have *bona et catalla proditorum, felonum, &c.* yet may they and the like bee had obliquely, or by a meane by prescription; for a countie palatine may be claimed by prescription, and by reason thereof to have *bona et catalla proditorum, felonum, &c.*

(c) 20 H. 3.  
Coron. 241.  
9 H. 7. 11. 20.  
18 H. 6.  
Prescript. 48.  
11 H. 4. 10.  
21 H. 7. 33.  
9 E. 4. 12.  
39 E. 3. 35.  
46 E. 3. 16.  
11 H. 6. 25.  
F. N. B. 91.  
1 H. 7. 24.  
Statut. Pl. Cor.  
38. 44 E. 3. 4.  
20 H. 4. 43. 44.  
3 H. 3. Breves  
Preser. 47.  
44 Ass. pl.  
[\*] 9 H. 6. 16.  
[\*] 12 E. 4. 16.  
33 H. 6. 25.  
12 Edw. Dier 389,  
389.

11 H. 3. 62. Inne 40. (3 Ro. Abr. 371. 3 Inst. 19. Cro. Jam. 125, 126. 404.) 15 H. 3. tit. Judgement. 133. 14 H. 3. 264. 265.

As to the second, by what meanes a title by prescription, or custome, may be lost by interruption. It is to be knowne, that the title, being once gained by prescription or custome, cannot be lost by interruption of the possession for ten or twenty yeares, but by interruption in the right; as if a man have had a rent or common by prescription, unity of possession of as high and perdurable estate is an interruption in the right.

In a writ of mesne the plaintife made his title by prescription, that the defendant and his ancestors had acquitted the plaintife and his ancestors and the terre-tenant time out of minde, &c. the defendant tooke issue, that the defendant and his ancestors had not acquitted the plaintife and his ancestors and the terre-tenant; and the jury gave a special verdict that the grandfather of the plaintife was enfeoffed by one *Agnes*, and that *Agnes* and her ancestors were acquitted by the ancestors of the defendant time out of minde before that time, since which time no acquittall had beene; and it was adjudged and affirmed in a writ of error, that the plaintife should recover his acquittall, for that there was once a title by prescription vested,

(3 Ro. Abr.  
371. 372.)

(1) See an observation on this doctrine against prescribing to make conservators of

the peace, in 2. Hawk. Pl. C. b. 2. c. 8. s. 10.

vested, which cannot be taken away by a wrongfull *cesser* to acquite of late time : and albeit the verdict had found against the letter of the issue, yet for that the substance of the issue was found, viz. a sufficient title by prescription, it was adjudged both by the court of common pleas, and in the writ of error by the court of king's bench for the plaintife; which is worthy of observation. So a *modus decimandi* was alledged [\*] by prescription time out of minde for tithes of lambes; and thereupon issue joyned; and the jury found, that before twenty yeares then last past there was such a prescription, and that for these twenty yeares he had paid tithe lamb *in specie*. And it was objected, 1. That the issue was found against the plaintife, for that the prescription was generall for all the time of prescription, and twenty yeares fail thereof. 2. That the party by payment of tithes *in specie* had waived the prescription or custome. But it was adjudged for the plaintife in the prohibition; for albeit the *modus decimandi* had not bin paid by the space of twenty yeares, yet, the prescription being found, the substance of the issue is found for the plaintife. And if a man hath a common by prescription, and taketh a lease of the land for twenty yeares, whereby the common is suspended, after the yeares ended, he may claime the common generally by prescription, for that the suspension was but to the possession and not to the right, and the inheritance of the common did alwayes remaine; and when a prescription or custome doth make a title of inheritance (as *Littleton* speaketh), the partie cannot alter or waive the same *in pais* (2).

[\*] Mich. 43.  
& 44 Eliz. in a  
prohibition be-  
tweene Nowell pl.  
and Hicks vicar  
of Edmonton de-  
fendant in the  
King's Bench.  
[2] Co. Bishop of  
Winton's case.  
6 Co. 69.  
3 Co. 2. 2. Re-  
Abr. 323.)

(Dr. & Stud. 17. a.)  
[c] Bracton, fol.  
314.

"*Temps dont memory, &c. et de title per prescription, que est tout un en ley.*" So as the time prescribed or defined by law is, time whereof there is no memorie of man to the contrary. [c] *Omnis querela, et omnis actio injuriarum, limita infra certa tempora.*

(1 Ro. Abr. 689.)

"*Temps de limitation.*" Limitation, as it is taken in law, is a certaine time prescribed by statute, within the which the demandant in the action must prove himselfe or some of his ancestors to be seised.

[f] Regist. 189.  
Bract. fo. 373.  
5 Am. p. 3.  
34 H. 6. 40.  
[g] Stat. de  
Mort. 20 H. 3.  
ca. 8.  
[h] West. 1. an.  
3 E. 1. c. 8.  
Vide W. 2.  
13 E. 1. ca. 46.  
[i] Mirror ca. 9.  
sect. 1.

"*En brieve de droit.*" In [f] ancient time the limitation in a writ of right was from the time of *H. 1.* whereof it was said *à tempore regis Henrici senioris*. After that by the statute of [g] *Merton* the limitation was from the time of *H. 2.* and by the statute [h] of *W. 1.* the limitation was from the time of *R. 1.* And this is that limitation, that *Littleton* here speaketh of. Whereof in the *Mirror* in reproofe of the law it is thus said : [i] *Abusion est de counter cy longe temps, dount nul ne poet testimonier de vieu et de oyer, que ne dure my generalment ouster 40 ans.*

Glanvil. li. 13.  
ca. 3 & 34.  
Mirror, ca. 5.  
sect. 4 Fletch.  
1. 2. c. 38. &  
1. 4. c. 8. Britton,  
fol. 79. 82.  
Bracton, 1. 2. f. 52.  
& f. 170. 253. 373.

Time of limitation is twofold : first, in writs; and that is by divers acts of parliament : secondly, to make a title [115. a.] to any inheritance; and that (as *Littleton* here saith) is by the common law.

Limitation of times in writs is provided by the said statute of *Merton* (1), and after by the said statute of *W. 1.* which *Littleton* here

(2) It is observable, that mr. serjeant Rolle has incorporated most of the preceding passages relative to prescription into his Abridgment. See Ro. Abr. tit. *Prescription*, and the additional matter in Vin.

Abr. same title R.—S.—T.

[115. a.]

(1) See cap. 39. and lord Coke's Commentary upon it in 2. Inst. 238.

here citeth, and which was in force when he wrote, but is since altered by a profitable and necessary statute [*k*] made *anno* 32 *H. 8.* and by that act, the former limitation of time in a writ of right is changed and reduced to threescore yeares next before the *teste* of the writ ; and so of other actions, as by the statute at large appeareth. But it is to be observed, that this act of 32 *H. 8.* extendeth [*l*] not to a *formedon* in the *discender* (2), nor to the services of escuage homage and fealty (3), for a man may live above the time limited by the act. Neither doth it extend to any other service, which by common possibility may not happen or become due within sixty yeares, as to cover the hall of the lord, or to attend on his lord when he goeth to warre, or the like ; nor where the seisin is not traversable or issuable (4). Neither doth it extend to a rent created by deed (5), nor to a rent reserved upon any particular estate ; for [*m*] in the one case the deed is the title, and in the other the reservation ; nor to any writ of right of advowson, *quare impedit* or assise of *darreine presentment* (for there was a parson of one of my churches that had been incumbent there above fifty yeares, and dyed but lately) or any writ of right of ward, or ravishment of ward, &c. but they are left as they were before the statute of 32 *H. 8.* (6). But hereof thus much for the better understanding of *Littleton* shall suffice (7).

“*De temps le roy R. 1.*” And that was intended from the first day of his raigne; for (*from the time*) being indefinitely, doth include the whole time of his raigne, which is to be observed.

“*Briefe de droit.*” *Breve de recto*, a writ of right ; so called, for that the words in the writ of right are, *quòd sine dilatione plenum rectum teneas*.

“*Title de prescription al common ley, &c. de temps dont memoire des homes ne curge al contraire.*” *Docere oportet longum tempus, & longum usum illum, viz. qui excedit memoriam hominum ; tale enim tempus sufficit pro jure.*

“*Aucun proofo al contraire.*” For if there be any sufficient proofo of record or writing to the contrary, albeit it exceed the memory, or proper knowledge of any man living, yet is it within the memory of man : for memory or knowledge is two-fold. First, by knowledge by proofo, as by record or sufficient matter of writing. Secondly, by his owne proper knowledge. A record or sufficient matter in writing are good memorialls ; for *littera scripta manet*. And therefore it is said, when we will by any record or writing commit the memory of any thing to posterity, it is said, *tradere memoria*. And this is the reason, that regularly a man cannot prescribe or alledge a custome against a statute, because that is matter of record, and is the highest proofo and matter of record in law. But yet a man may prescribe against an act of parliament, when his prescription or custome is saved or preserved by another act of parliament.

There is also a diversity betweene an act of parliament in the negative and in the affirmative ; for an affirmative act doth not take away

[*k*] 32 *H. 8.*  
cap. 2. See the  
second part of the  
Institutes.  
Merton, c. 8.

[*l*] Mich. 10 & 11  
Edw. Dyer 578.  
Pitcrill's case.

4. Co. 10. & 11.  
Borell's case.  
[*m*] 5. Co. 66.  
Sir William  
Foster's case.

1. Mar. Parliam.  
2. cap. 2.  
Vide 17 *H. 3.* 11.  
Pl. Com. 371. b.

Vide 34 *H. 6.* 30.

Bract. lib. 4.  
fol. 230.  
Fleta, lib. 4.  
cap. 24.  
(5 Co. 73. Dr. &  
Strad. 10. b.)

(3 Co. 121.)  
28 *Ass. 29.*  
33 *Ass. 18.*  
46 *E. 3.* 20.  
5 *H. 7.* 10.  
5 *H. 7.* 7.  
11 *H. 7.* 21.  
Dyer 23 *Edw. 2.* 373.

(2. Ro. Abr. 205.  
4. Inst. 274.  
208. 303.  
2. Inst. 20.  
11. Co. 63.  
12. Co. 28.

Flow. 207. Cro. Jac. 312. 2. Ro. Abr. 205.)

(2) [See Note 148.]  
(3) Acc. 3. Lev. 21.  
(4) [See Note 149.]

(5) [See Note 150.]  
(6) [See Note 151.]  
(7) [See Note 152.]

away a custome (8); as the statutes of wills of 32 and 34 H. 8. doe not take away a custome to devise lands, as it hath bene often adjudged. Moreover, there is a diversity betweene statutes that be in the negative; for if a statute in the negative be declarative of the ancient law, that is in affirmance of the common law, there as well as a man may prescribe or alledge a custome against the common law, so a man may doe against such a statute; for, as our author saith, *consecutio, &c. privat communem legem* (9). As the statute of *Magna Charta* provideth that no leet shall be holden but twice in the yeare (10), yet a man may prescribe to hold it oftener, and at other times (11); for that the statute [n] was but in affirmance of the common law (12).

So the statute [o] of 34 E. 1. (13) provideth, that none shall cut downe any trees of his owne within a forest without the view of the forester; but inasmuch as this act is in affirmance of the common law (14), a man may prescribe to cut downe his woods within a forest without the view of the forester (15). And so was it adjudged in 16 E.H. in the exchequer by sir *Edward Sanders* chiefe baron, and other the barons of the exchequer, as sir *John Popham* chiefe justice of the king's bench reported to me.

In the eire of the forest of *Pickering* before *Willoughby Hungerford* and *Hanbury* justices itinerants, there, anno 8 E. 3. I reade [h] a claime made by *Henry de Percy*, lord of the mannor of *Semor* within the said forest. The foresters, verderours, and regarders found his claime to be true, viz. *quod predictus Henricus de Percy, & omnes antecessores sui iunctes manerium predictum a tempore quo non extat memoria, & sine interruptione aliquali, tenuerunt predictum manerium cum pertinentiis extra & gardum forestæ, & habuerunt woodwardum portantem arcum & sagittas ad presentandum presentandâ de venatione tantum, &c. & habuerunt in boscis suis de Semere forgras & mineras, & amputârunt, dederunt, & ventiderunt boscum suum infra manerium predictum, sine viâ forestariorum pro voluntate sua, & fugârunt & cepêrunt vulpes, lepores, capreolos, &c. sicut idem Henricus Percy superius clamat* Which claime by prescription, and found as is aforesaid, the justices doubted onely of two points. The first, forasmuch as the said manor was within the limits of the forest, it should not onely be *contra assisum forestæ*, for his woodward to beare bow and arrowes, where by law he ought to beare but an hatchet, and no bow nor arrowes within the forest, but also *de facili cedere possit in destructionem ferarum, &c.* and they therefore doubted whether it might be claimed by prescription. Their second doubt was concerning *fugationem & captivum capreolorum in boscis suis predictis, cò quòd est bestia venationis forestæ, & transgressores inde convicti finem facerent ut pro transgressionem venationis*: and for that difficulty, the claime was adjourned into the king's bench. But of the other parts of the prescription no doubt at all was made: and the like had been allowed in the same eire, as in the case of *Thomas* lord *Wake of Lydell*, and of *Gilbert of Acton*, in the same eyre, Rot. 37. and of others.

"*Il est prove par le pleader.*" Note, one of the best arguments or proofes in law is drawne from the right entries or course of pleading;

*Magna Charta,*  
cap. 36.  
(2. Leon. 30.)

[a] 6 H. 7. 8.  
8 H. 4. 34.  
12 H. 7. 18.  
21 H. 6. Lect 11.  
19 H. 6. 13.  
[c] 24 H. 1.  
tit. Forest. Ruff.  
1 E. 3. cap. 2.  
(Doc. Plac. 308.  
3. Rot. Abr. 209.  
Ante 2. Post. 165.  
h. 233. a. Cro.  
Jura. 155. Dr. &  
Stud. 164.)  
[d] Itin. Pickering  
anno. 8 E. 3.  
Rot. 38.

(3. Co. 136.  
Cro. Jura. 155.)

(Post. 126. a. 263.  
a. Ante 17. a.  
10. Co. 56.  
1. Sibi. 330.)

- (8) [See Note 153.]
- (9) [See Note 154.]
- (10) [See Note 155.]
- (11) [See Note 156.]
- (12) [See Note 157.]

- (13) [See Note 158.]
- (14) Acc. Manw. Forr. L. 1st. ed. 41. a. and  
Fitz. Abr. Trespass 239. there cited.
- (15) [See Note 159.]

ing; for the law it self speaketh by good pleading; and therefore *Littleton* here saith, it is proved by the pleading, &c. as if pleading were *ipsius legis viva vox*.

*"Entant que tiel title per prescription fuit al common ley, &c."*

Note, all the prescriptions that were limited from a certaine time were by act of parliament, as from the time of *H. 1.* which was the first time of limitation set downe by any act of parliament, and so from the reigne of *R. 1.* &c. But this prescription of time out of memory of man was (as *Littleton* here saith) at the common law, and limited to no time. Also here is implied a maxime of the law, viz. that whatsoever was at the common law, and is not ousted or taken away by any statute, remaineth still.

*"Common ley."* The law of *England* is divided, as hath beene said before, into three parts; 1. the common law, which is the most generall and ancient law of the realme, of part whereof *Littleton* wrote; 2. statutes or acts of parliament; and 3. particular customes (whereof *Littleton* also maketh some mention). I say particular, for if it be the generall custome of the realme, it is part of the common law.

The common law hath no controller in any part of it, but the high court of parliament; and if it be not abrogated or altered by parliament, it remaines still, as *Littleton* here saith. The common law appeareth in the statute of *Magna Charta* and other ancient statutes (which for the most part are affirmations of the common law) in the originall writs, in judicall records, and in our bookes of termes and yeares. Acts of parliament appeare in the rolls of parliament, and for the most part are in print. Particular customes are to be proved.

(Ante 110. b.  
Post 244. a.)

(Pref. to 2th Co.)

## Sect. 171.

**I**TEM, chescun burgh est un ville, mes nemy è converso. Plus serra dit de custome en le Tenure de Villenage.

**A**LSO, every borough is a towne, but not è converso. More shall be sayd of custome in the Tenure of Villenage.

*"VILLE," villa, quasi vehilla, quod in eam convehantur fructus.*

And it is called vicus, because it is prope viam. Villa est ex pluribus mansionibus vicinata, & collata ex pluribus vicinis. If a town be decayed so as no houses remaine, yet it is a towne in law. And so if a borough be decayed, yet shall it send burgesses to the parliament, as Old *Salisbury* and others doe. It cannot be a towne in law, unlesse it hath, or in time past hath had, a church, and celebration of divine service, sacraments and burials. What alteration hath beene made in townes, heare what a great lawyer saith. In *Angliâ villula tam parva inveniri non poterit, in quâ non est miles, armiger, vel paterfamilias, &c. magnis ditatus possessionibus, nec non liberi tenentes alii & valecti plurimi, suis patrimonii sufficientes, &c.* And it appeareth by *Littleton*, that a towne is the genus, and a borough is the species; for hec saith that every borough is a towne, but

(2. Inst. 659)  
Vid. Linwood.  
verbo Vicus.  
Bract. lib. 5. fol.  
434. & lib. 2.  
fol. 211. Fortescue,  
cap. 50.  
7 E. 6. Fines levie  
de terre.  
Br. 91.  
34 E. 1. Quare  
imp. 187.  
Fortescue, cap. 59.

Fortescue, cap. 24.

but every towne is not a borough. *Et sub appellatione villarum continentur burghi & civitates.*

Domesday, Glouc.

*Berewica*, or *berewit*, in *Domesday* signifieth a towne. *Ha berewica pertinent ad Berchley. (Et sic recitat plus quàm viginti villas.)* [116. a.]

Domes. ubi sup.  
Flet. E. 4. c. 13. &  
Hb. 6. ca. 48.  
Brit. An. 134. &  
274. 82a.

There be in *England* and *Wales* eight thousand eight hundred and three townes; or thereabouts.

See more *de villis, parochiis et hamletis*, in the ancient authors of the law, and plentifully in our other bookes. But let us now heare what *Littleton* saith (1).

(1) [See Note 160.]



**T**ENURE en villenage est plus proprement, quant un vilain tient de son seignior, a que il est vilain, certaine terres ou tenements solonque le custome del manor, ou autrement, a la volunt son seignior, et de faire a son seignior vilain service; come de porter et de carier le fume le seignior hors del city, ou del manor (2) son seignior, jesques a le terre son seignior, engisant ceo (3) sur le terre, et hujusmodi. Et ascuns frankhomes teignent lour tenements solonque le custome del certaine manors, per tiels services. Et lour tenure auxy est appel tenure en villenage, et uncore ils ne sont pas villeines; car nul terre tenus en villenage, ou villeine terre, ne ascun custome surdant de la terre, ne unques ferra frank home vilain. Mes un vilain puit faire frank terre d'être vilain terre a son seignior. Sicome lou un vilain purchase terre en fee simple, ou en fee taile, le seignior del vilain poet enter en la terre, et ouste le vilain et ses heires a tous jours; et puis le seignior (s'il voloit) puit lesser mesme la terre a le villeine, a tener en villenage.

**T**ENURE in villenage is most properly, when a villeine holdeth of his lord, to whom he is a villeine, certaine lands or tenements according to the custome of the mannor, or otherwise, at the will of his lord, and to doe to his lord villeine service; as to carry and recarry the dung of his lord out of the city, or out of his lord's mannor, unto the land of his lord, and to spread the same upon the land, and such like. And some free men hold their tenements according to the custome of certaine manors, by such services. And their tenure also is called tenure in villenage, and yet they are not villeines; for no land holden in villenage, or villein land, nor any custome arising out of the land, shall ever make a free man villeine. But a villeine may make free land to bee villeine land to his lord. As where a villeine purchaseth land in fee simple, or in fee taile, the lord of the villeine may enter into the land, and oust the villeine and his heires for ever; and after, the lord (if hee will) may let the same land to the villein, to hold in villenage.

**"TENURE en villenage."** Villeine is from the French word *villaine*, and that à villa, quia villa adscriptus est; for they which are now called *villani*, of ancient times were called *adscripti*. And in the common law he is called *nativus*; quia pro majore parte natus est servus: and this is hee which the civilians call *servus*. [a] Theyn in the Saxon tongue is *tiber*, and then, *servus*. *Theme* (sometimes written *theame* corruptly) is an old Saxon word, and signifieth *potestatem habendi in nativos sive villanos, cum eorum sequeliis, terris, bonis et catallis*. But *teame*, sometime corruptly written *theame*, is of another signification; for it is also an old Saxon word, [b] and signifieth, where a man cannot produce his warrant of that which he bought according to his voucher.

**"Villenage."** *Villenagium*, (as in like cases hath been sayd where the termination is in *age*) is the service of a bondman. And yet a free

(2) In L. and M. and Roh. the words are *del cite* (which seems used in the same sense as *scite*) *del mannor*.

(3) Instead of *en gisant ceo*, the words in L. and M. and Roh. are *gisant wurret: et de spredre le fume le seignior*.

Lib. Rab. 76, & 77.  
Glanv. R. 5. ca. 1. & 2. &c.  
Vide Bract. li. 1. ca. 6, &c.  
Brit. R. 77. & 67. 82. 97. 98.  
135. 136. 147.  
Flet. li. 1. c. 3.  
Flet. li. 2. cap. 44.  
Idem. li. 4. cap. 11. & 12.  
Mir. ca. 2. sect. 18. Ockam.  
(F. N. B. 77. a.)  
[a] Flet. li. 1. ca. 34.  
[b] Vid. Lamb. inter leges Sanct. Edw. R. 132. nu. 25.

free man may doe the service of him that is bond. And therefore a tenure in villenage is twofold; one, where the person of the tenant is bond, and the tenure servile; the other, where the person is free, and the tenure servile. [c] *Servus terra liberus de sanguine existens, villanos facere non potest.* And therefore it is said, [d] *est enim ratio et regula generalis in istis duobus casibus, quod liber homo nihil libertatis propter personam suam liberam confert villenagio, nec liberum tenementum è contrario mutat statum aut conditionem villani.* And againe, [e] *Villanagium vel servitium nihil detrahit libertati; habita tamen distinctione utrum talis sit villanus, et teneantur in villano sociatio de dominico domini regis.* And againe, [f] *Tenementum non mutat statum liberi non magis quam servi; poterit enim liber homo tenere purum villanagium, faciendo quicquid ad villanum pertinebit, et nihilominus liber erit, cum hoc faciat ratione villanagii, et non ratione persone sue: et ideo poterit, quando voluerit, villanagium decedere, et liber discedere, nisi illaqueatus sit per uxorem nativam ad hoc faciendum, ad quam ingressus fuit in villanagium, et quæ præstare poterit impedimentum, &c.* And againe, [g] *Purum villanagium est, à quo præstatum servitium incertum et indeterminatum, ubi seire non poterit vespere quille servitium fieri debet mane, viz. ubi quis facere tenetur quicquid ei præceptum fuerit.* And another saith to the same intent, *Cruz ne scavoient le vespere, de quoy ils serverent en la matyn.* [h] *Fuerunt in Conguestu liberi homines, qui libere tenebant tenementa sua per libera servitia, vel per liberas consuetudines; et cum per potentiores ejecti essent, postmodum reversi receperunt eadem tenementa sua tenenda in villanagio, faciendo inde opera servitia, sed certa et nominata, &c. et nihilominus liberi, quia, licet faciant opera servitia, cum non faciunt ea ratione personarum, sed ratione tenementorum, &c.*

How villenage or servitude began, and for what cause, it is said, [i] *Ab homine et pro vitio introducta est servitus. Sed libertas à Deo hominis est indita natura. Quare ipsa ab homine sublata, semper redire gliscit, ut facit omne quod libertate naturali privatur.* And another saith, [k] that the condition of villeins from freedom unto bondage, of ancient time grew by constitutions of nations. [l] *Piunt etiam servi liberi homines captivitate de jure gentium, and not by the law of nature, as from the time of Noah's Flood forward, in which time all things were common to all, and free to all men alike, and lived under the law naturall; and by multiplication of people, and making proper and private those things that were common, arose battels. And then it was ordained by constitution of nations, that none should kill another; but that he that was taken in battell, should remain bond to his taker for ever, and he to doe with him, and all that should come of him, his will and pleasure, as with his beast, or any other chattell, to give, or to sell, or to kill: and after it was ordained, for the cruelty of some lords, that none should kill them, and that the life and members of them, as well as of freemen, were in the hands and protection of kings, and that he that killed his villeine, should have the same judgment as if he had killed a freeman. Thereupon they were called servi, quia servabantur è dominis et non occidebantur, et non à serviendo.* He is called *nativus*, à nascendo, quia filiumque natus est servus; and he is called *villanus*, for that he doth his villeine service in villis.

*Est autem libertas naturalis facultas ejus, quod cuique facere libet, nisi quod de jure, aut vi prohibetur. Servitus est constitutio de jure gentium, quæ quis domino alieno contra naturam subjicitur.* And againe, Et

[f] N. B. 12.  
2. Mol. Abr. 724.  
[c] Hil. 29 E. 1.  
Cor. reg. Ebor. in  
thesaur.  
[d] Bract. li. 4.  
§. 170.

[e] Mem. R. Len. 8.  
Brit. c. 31. & 66.  
Flet. li. 1. ca. 3.

[f] Bract. li. 2.  
§. 3. A. sec.

[g] Bract. li. 4.  
§. 208.  
Brit. ca. 31.

[h] Bract. li. 1.  
§. 1.

[i] Forster.  
cap. 43.

[j] Brit. ca. 31.  
[k] Bract. li. 1. ca. 6.  
Flet. li. 1. ca. 3.  
& ca. 5.  
M. cap. 2.  
sect. 16.

[l] N. B. 77. 2.  
Bract. li. 1. ca. 6.  
Briton. ca. 31.  
& ubi supr.  
Flet. li. 1. ca. 9.  
& 3.

[m] *Et tout soyt que tous creatures duissent este frank solongue le ley de nature, par constitution nequidant, et fait de homes sont autres creatures enservies, sicome est dit beausts en parkes, fissions en servours, et oyseux en cages.*

[m] Mirror, cap. 24 sect. 18.

[n] This is assured, that bondage or servitude was first inflicted for dishonouring of parents; for *Cham* the father of *Canaan* (of whom issued the *Canaanites*) seeing the nakednes of his father *Noah*, and shewing it in derision to his brethren, was therefore punished in his sonne *Canaan* with bondage. And herewith agreeth the divine: *Ante vinū inventionem inconcussa libertas. Non esset hodie servitus, si ebrietas non fuisset.*

[n] Mirror, cap. 2. sect. 18. Genesis ix. verſ 10, 11, &c.

Ambros.

“*Hors del citie ou del mannor, &c.*” This is false printed, for the [117. a.] originall is, *hors del ecite del mannor*, and so would it be amended in the impressions of the booke hereafter.

“*Et ascuns frank homes teignent, &c.*” This is apparent enough, especially upon that which hath beene said.

Mirror, cap. 2. sect. 18. and

“*Ou un villeine purchase terre en fee simple.*” Yet the villeine may purchase some kinde of inheritances in fee simple, which the lord of the villeine cannot have. As if a villeine purchase a common *sauns nombre*, the lord shall not have it; for the lord may surcharge the same, which should be a prejudice to the terre-tenant: and the same law of a *corodie incertaine* granted to a villeine, and such like inheritances. And therefore *Littleton* materially said, *purchase terre*. When the villeine hath an estate of any thing certaine, the lord shall have it; as a rent granted to the villeine, commons certaine, estovers certaine, and such like. [o] But that which lyeth in action, as a warranty made to the villeine his heires and assignes, the lord shall not take advantage of by voucher; because it is in lieu of an action. Neither shall the lord take advantage of any obligation or covenant, or other thing in action made to the villeine; because they lye in privity, and cannot be transferred to others.

Mirror, cap. 2. sect. 18.

22. Am. p. 37.

[o] Doct. and Stad. ca. 43. (3. Co. 62. 63. 5. Ro. Abr. 749. Post. 130. a.)

[p] If a man be lessee of a villeine for life, for yeares, or at will, and the villeine purchaseth lands in fee; if the lessee entreth into the lands, he shall hold the lands as a perquisite to him and his heirs for ever. But if a bishop hath a villeine in the right of his bishopricke, and he purchaseth lands, and the bishop entreth, the bishop shall have this perquisite to him and his successors, and not to him and his heirs; for the law respecteth the quality, and not the quantity of his estate. So if executors have a villeine for yeares, and the villeine purchase lands in fee, and the executors enter, they shall have a fee simple, but it shall be assets.

[p] 1. S. E. 4. 61. 18 E. 3. 29. 21 H. 8. 37. Bro. tit. Vil. 78. (Flow. 234. a.) Ante 90. a.)

“*Fee taile.*” By this it is apparant, that if lands bee given to a villeine, and to the heires of his body, the lord may enter and put out the villeine and the heires of his body; for *quicquid acquiritur servo acquiritur domino* (1). And in this case the lord gaines a fee simple determinable upon the dying of the villeine without heire of his body; and the absolute fee simple remaineth still in the donor. And if the lord enter, and after infranchise the donee, and after the donee hath issue, yet that issue shall never have remedy either by *formedon*

15 E. 4. 2. b. Pl. Com. 554. in Waddingham's appo.

or entry, to recover this land, by force of the statute of *donis conditionalibus*; for that statute giveth remedy to the issues of the donee, that have capacity and power to take and retaine such a gift; and the title of the lord remaines, as it did at the common law, for the statute restraineth acts done only by the tenant in taile. And so it is, if lands be given to an alien, and to the heires of his body, upon office found, the land is seised for the king, afterwards the king makes the alien a denizen, who hath issue and dyeth, the king shall detain the land against the issue.

## Sect. 173.

**F**T nota, si feoffment soit fait a certaine person ou persons en fee, al use de un villeine; ou si un villeine, ore auters persons, soient enfeoffes al use le villeine; quel estate que le villeine ad en le use, en fee taile, pur terme de vie ou d'ans, le seignior del villeine poit entrer en tous ceux terres et tenements, sicome le villeine ust este sole seisie del demesne. Et c'est per l'estatute de anno 19 H. 7. cap. 15. (2).

**A**ND note, if a feoffment be made to a certaine person or persons in fee, to the use of a villeine; or if a villeine, with other persons, be infeoffed to the use of the villein; what estate soever that the villein hath in the use, in fee taile, for terme of life or yeares, the lord of the villein may enter into all those lands and tenements, as if the villein had been sole seised of the demesne. And this is given by the statute of anno 19 H. 7. ca. 15.

**T**HIS is an addition to *Littleton*; and the statute of 19 H. 7. ca. 15. therein mentioned, for the cause that hath beene aforesaid, hath lost his force (3).

## Sect. 174.

[117. b.]

**M**ES si ascun franke home voille prendre ascun terres ou tenements, a tener de son seignior per tiel villein service, scil. a payer un fine a luy (1) pur le mariage de ses fils ou filles, donque il paiera tiel fine pur le mariage; et nient obstant que il est le folle de tiel frank home de prendre en tiel forme terres ou tenements a tener de le seignior per tiel bondage, uncore ceo ne fait le frank home villeine (2).

**B**UT if a free man will take any lands or tenements, to hold of his lord by such villeine service, viz. to pay a fine to him for the marriage of his sonnes or daughters, then he shall pay such fine for the marriage; and notwithstanding though it be the folly of such free-man to take in such forme lands or tenements to hold of the lord by such bondage, yet this maketh not the free man a villeine.

(2) This Section was first introduced in Redman's edition.

(3) [See Note 162.]

[117. b.)

(1) In Roh. the words *pur son mariage* ou come in here.

(2) This Section in L. and M. stands the last in the Chapter of Villenage.

**A** *PAIER un fine pur le mariage, &c.* [g] And this villeine and servile tenure is called in old bookes *merchetum* or *merchet*. *Marchetum verò pro filiâ dare non competit libero homini, inter alia, propter liberi sanguinis privilegium, &c.* And this is true *de communi jure, sed modus et conventio vincunt legem.* And as *Littleton* here saith, it is the folly of such a freeman to take such mannors, lands or tenements, to hold of the lord by such bondage. And yet this doth not make such a freeman a villeine. [r] *Quia hujusmodi præstationes fiunt ratione tenementi, et non ratione personæ in donatione comprehensæ et reservatæ; non enim unum et idem est, sed longè aliud, tenere liberè, et fieri liberum servitium, &c.* For the signification of this word, *vide* Sect. 194. 74. 441.

[g] 15 E. 3. tit. Aid 33. Bracton, lib. 2. fo. 95. Mirror, ca. 2. sect. 18. See more of this after in this Chapter Sect. 194. (Dr. & Stud. 66. b.)

[r] Fleta, lib. 5. cap. 13. Mirror, cap. 2. sect. 18.

## Sect. 175.

**I**TEM, chescun villeine ou est un villeine per tittle de prescription, c'estascavoir, que il et ses auncestors ont este villeins de temps dont memorie ne curt; ou il est villeine per son confession demesne en court de record.

**A**LSO, every villeine is either a villeine by title of prescription, to wit, that hee and his ancestors have been villeines time out of mind of man; or he is a villeine by his owne confession in a court of record.

**C**HESCUN villeine ou est villeine per tittle de prescription, &c." Every villeine is, either by prescription, or confession. *Servi aut nascuntur, aut fiunt.* By prescription, either regardant to a mannor, &c. or in grosse. In gross, either by prescription, or by granting away a villeine that is regardant, or by confession. [s] *Fit etiam servus liber homo per confessionem in curiâ regis factâ* (3).

(2. Ro. Abr. 73.) Lib. Rub. cap. 76, 77. Bracton, lib. 1. cap. 6. Bract. fol. 77. (Post. 130. a.) [s] Bract. lib. 1. cap. 6. Fleta, lib. 1. ca. 3. 8 Ass. p. 13. 11 Ass. 12.

24. Ass. 1. 73. Ass. 1. 17 E. 3. 78, 79. 27 E. 3. 89. 18 E. 4. 25. 27 H. 8. 7. b. Le statute de 17 E. 3. 17.

**"En court de record."** Record is derived of the *Latine* word *recordor*, that is, to keepe in minde, as the poet saith, *Si ritè audita recordor.* And therefore a record or inolment is a memoriall or monument of so high a nature, [t] as it importeth in it selfe such an absolute verity, as if it be pleaded (4) that there is no such record, it shall not receive any triall by witnesse, jury, or otherwise, but only by itselfe. [u] And every court of record is the king's court, albeit another may have the profit, wherein if the judges do erre, a writ of error doth lye. [x] But the county court, the hundred court, the court baron, and such like, are no courts of record; and therefore the proceedings therein may be denyed, and tryed by jury, and upon their judgements a writ of error lyeth not, but a writ of false judgement, for that they are no courts of record, because they

[118. a.] cannot hold plea of debt or trespassse, if the debt or damages doe amount to forty shillings, or of any trespassse *vi et armis* (1).

*Monumenta, quæ nos recorda vocamus, sunt veritatis et vetustatis vestigia.*

[t] 17 E. 3. 23. 11 H. 4. 26. 37 H. 6. 21. Dier Mich. 7 & 8 Edw. 243. Pl. Com. 79, &c. [u] Glanvil. lib. 9. cap. 8. Bracton, lib. 3. fo. 156. Brit. 80. 121. [x] 6. Co. 11. & 12. in Jentleman's case. (3. Inst. 71. F.N.B. 138. Post. 128. 260. a. 4 Co. 71. a. 8 Co. 38. 1. Ro. Abr. 327. 2. Ro. Abr. 862. 863. Plow. 491. b. 1. Sid. 94. 2. Ro. Abr. 673. 676. 1. Sid. 314.) (14 H. 8. 15. 1. Rol. Ab. 443.)

(3) [See note 163.]

(4) [See Note 164.]

[118. a.]

(1) See post. 260. a.

Sect.

## Sect. 176.

**M**ES si frank home ad divers issues, et puis il confesse luy meme d'estre vilain a un auter en court de record; uncore les issues que il avera devant le confession sont franks, mes les issues que il avera apres le confession serront villaines.

**B**UT if a freeman hath divers issues, and afterwards he confesseth himselfe to be a villaine to another in a court of record; yet those issues which he hath before the confession are free, but the issues which he shall have after the confession shall be villaines.

This is so evident as it needeth no explication.

## Sect. 177.

**I**TEM, si le vilain purchase terre, et alien la terre a un auter devant que le seignior enter, donques le seignior ne poit enter; car il serra adjudge son follic, que il n'entra pas, quant la terre fuit en le maine le vilain. Et issint est dex biens. Si le villaine achate biens, et eux vend ou dohe a un auter, devant que le seignior seisist les biens, adonques le seignior ne poit eux seiser. Mes si le seignior, devant ascun tiel vender ou done, vient deins la ville la lou tielx biens sont, et la, overtment enter les vicines, claima les biens, et seisist parcel des biens, on nosme de seisin de tous les biens que le villaine ad ou aver poit (1), &c. ceo est dit bon seisin en ley; et le occupation que le villaine ad apres tiel claine en les biens, (2) serra pris en le droit le seignior.

**A**LSO, if a villaine purchase land, and alien the land to another before that the lord enter, then the lord cannot enter; for it shall be adjudged his folly, that he did not enter, when the land was in the hands of the villaine. And so it is of goods. If the villaine buy goods, and sell or give them to another, before the lord seiseth them, then the lord may not seise the same. But if the lord, before any such sale or gift, commeth into the towne, where such goods be, and there, openly amongst the neighbors, claime the goods, and seise part of the goods, in the name of seisin of all the goods which the villaine has or may have, &c. this is a good seisin in law, and the occupation which the villaine hath after such clayme in the goods, shall be taken in the right of the lord.

(Dr. & Stud. 140.  
2 Rab. Abr. 735.)

**I**N this case before the lord doth enter, hee hath neither *jus in re* nec *jus ad rem*, but onely a possibilitie of an estate, which estate he must gaine by his entry; and therefore if the villaine doth by way of prevention alien before the lord doth enter, the lord is barred of the

(1) The words que le vilain ad ou aver poit, not in L. and M. nor Rth.

(2) Instead of les biens, it is ley in L. and M. and Rth.

the possibility, which he had to the land, for ever. [a] *Si autem servus vendiderit feodum, quod sibi et hæredibus perquisiverit, antequam dominus seisinam inde ceperit, valet donatio, et dominus sibi ipsi imputet, quod tantum expectavit.* But [b] if the villaine of the king purchaseth land, and alieneth before the king (upon an office found for him) doth enter, yet the king after office found shall have the land; *quia nullum tempus occurrit regi*, as Littleton himselfe saith in the next Section. (2). And yet, after office found, the king shall not have the meane profits; because the title is by the seisure.

[a] Fleta, lib. 2. ca. 13. Britton, fol. 98. a. 19 E. 2 Dower 17.

[b] 35 E. 3. tit. Villenage 22. 9 H. 6. 21. per Babington. 12 H. 7. 12. (3 Co. 170. 7 Co. 28. 2. Ro. Abr. 734.

“Purchase terre.” The like law is of seigniories, advowsons, reversions, remainders, rents, commons certaine, and such like certaine inheritances, wherein the villaine hath any estate or interest. [118. b.] If the villaine purchase land either in fee simple, fee taile, or for life, if the villaine doth alien before the lord doth enter, hee doth prevent the lord. But yet the issue of the villaine shall recover the land entailed in a formedon, and then the lord may enter.

“Alien la terre.” Alien commeth of the verbe *alienare*, id est, *alienum facere, vel ex nostro dominio in alienum transferre, sive rem aliquam in dominium alterius transferre.* If a freeman hath issue, and afterward by confession becommeth bond, and purchaseth lands in fee, and, before the lord enter, he dieth seised, and the land descends to his issue which is free; in this case the lord shall not enter upon the heire, and yet this is a descent and no alienation. The like law it is, if the land so purchased by the villaine doth escheate to the lord of the fee before any entry made by the lord of the villaine: so as the act of the law, that is, the descent or escheat may as well prevent the lord of his entry, as the act of the party by alienation.

If a villaine be disseised before the lord doth enter, the lord may enter into the land in the name of the villaine, and thereby gaine the inheritance of the land; but if there be a descent cast, so as the entry of the villaine be taken away, then the villaine must recontinue the estate of the land by judgement and execution, before the lord of the villeine can enter. And this word [alien] doth not onely extend to alienations of land in deed, but also to alienations in law; as if the villeine purchase land and dyeth without heire, and the land escheate, or if there be a recovery against the villaine in a *cessavit*, or the like.

“Et issint est des biens, &c.” *Biens, bona*, includes all chattels, as well reall as personall. *Chattels* is a French word, and signifies goods, which by a word of art we call *catalla*. Now goods, or chattels, are either personall or reall. Personall, as horse and other beasts, housholdstuffe, bowes, weapons and such like, called personall, because for the most part they belong to the person of a man, or else for that they are to be recovered by personal actions. Reall, because they concerne the reality, as tearmes for yeares of lands or tenements, wardships, the interest of tenant by statute staple, by statute merchant, by *elegit*, and such like.

(3 Ro. Abr. 732. 5 Co. 109. 3 Ro. Abr. 88. Cro. Eliz. 386.)

*Bona dividuntur in mobilia et immobilia. Mobilia rursum dividentur in ea, quæ se movent et quæ ab aliis moventur.* But, by the common law, no estate of inheritance or freehold is comprehended under these words *bona* or *catalla* (3). And it is to be observed, that as the

tit. *Chattels*, Com. Dig. tit. *Biens* and *Aspects*, and Vin. tit. *Executors*, U—Y—Z.

(2) See post. 119. a. [118. b.]

(3) See farther as to chattels, Bro. Abr.

the title of the lord to his villeine's lands beginneth by his entry, so his title to the goods beginneth by the seisure of them. And here againe it is to be observed, that where our author, in this branch concerning goods, useth these words (sell or give) that the same extendeth as well to gifts in law, as gifts in deed. And therefore if a niefie hath goods, and taketh baron, by this gift in law by force of the marriage, the lord is barred. And so it is if a villaine make his executors and dieth, by this gift in law the lord is barred, as shall be said hereafter.

3 H. 4. 15.  
46 E. 3. Barre  
217. Doct. and  
Stud. cap. 43. fol.  
139.  
22 E. 3. 6.  
Baldwin Freuil's  
case.  
(Ante 28. Post.  
145. b.)  
[c] 18 H. 6.  
23 b. per Assough.  
3 H. 4. 16.  
46 E. 3. Barre  
217.

"*Et claime les biens, at sciaist parcel des biens.*" For a claime onely of the goods of the villaine is not sufficient in law, but he must seise some part in the name of all the residue, as here it appeareth ; or that the goods be within the view of the lord ; for the claime and his view amount to a seisure, as the clayme of a ward being present by word is a sufficient seisure, albeit the gardian layeth no hands on him. See hereafter Sect. 321. And so note a diversity between a claime of lands or tenements and goods. [c] In an action of trespass or detinue brought by the villaine, a release made to the defendant by the lord is a good barre ; for that amounts to a seisure and grant. If the villaine doth buy goods and make his executors, and dieth before the lord doth seise them, the executors shall detain them against the lord of the villaine.

"*Ad ou aver poit, &c.*"<sup>4</sup> Here (*&c.*) doth imply an excellent point of learning, for that such a claime doth not only vest the goods, which the villaine then hath, but also which he after that shall acquire and get (4). But otherwise it is of lands of freehold or inheritance ; for there such a generall entry or claime extends only to the lands the villaine hath at that time, and not to any other which he shall purchase after, as by our author [119. a.] in this Section may justly be collected.

## Sect. 178.

**M**ES si le roy ad un villain, que purchase terre, et alien devant que le roy entra ; uncore le roy poit enter, en que maines que la terre deviendra. Ou si le villain achata biens, et eux vendist devant que le roy seisist les biens ; uncore le roy poit sciser les biens, en que maines que les biens sont. Quia nullum tempus occurrit regi.

**B**UT if the king hath a villeine, who purchases land, and alien it before the king enter ; yet the king may enter, into whose hands soever the land shal come. Or if the villeine buyeth goods, and sell them before that the king seiseth them ; yet the king may seise these goods, in whose hands soever they be. Because *nullum tempus occurrit regi* (1).

Vide Sect. 125.  
Vide Stamford  
Per. c. 32. c.

"*SI le roy ad villain, &c.*" This is evident upon that which hath been said before.

"Ou

(4) *Contra*, as to the goods, *afterwards* acquired, Dr. and Stud. dial. 2. chap. 4.

[119. a.]  
(1) [See Note 165.]



"Ou si tiel villeine achata biens, &c." If the king's villeine acquire any goods or chattels, the propertie of them is in the king before any seisure or office; and it is well said of an ancient author, [d] *Al roy, quant al droit de la corone ou a franch estate, ne poet nul temps occurre*; and another [e] speaking in the person of the king saith, *Nul temps n'est limit quant a mes droits*.

35 E. 3. tit.  
Villanage 22.

[d] Mirror, cap. 3.  
[e] Britton, fol.  
88. Bract. lib. 1.  
que res dari  
possint.

## Sect. 179.

**I**TEM, si home lessa certaine terre a un auter pur terme de vie, servant le reversion a luy, et un villein purchase del lessor le reversion; en cest cas il semble, que le seignior del villeine poit maintenant vender a la terre, et claime le reversion come le seignior le dit villeine, et per cel claime le reversion est maintenant en luy. Car en auter forme il ne poit vender a le reversion. Car il ne poit enter sur le tenant a terme de vie. Est s'il doit demurrer tanque apres le mort le tenant a terme de vie, donques per cas il viendra trope tarde. Car peraventure le villeine voile grantier ou alier le reversion a un auter en le vie le tenant a terme de vie, &c.

**A**LSO, if a man let certaine land to another for terme of life, saving to himself the reversion, and a villeine purchase of the lessor the reversion; in this case it seemeth, that the lord of the villeine may presently come to the land, and claime the reversion as the lord of the said villeine, and by this claime the reversion is forthwith in him. For in other forme or manner he cannot come to the reversion. For he cannot enter upon the tenant for life. And if he should stay untill after the death of the tenant for life, then perchance he should come too late. For peradventure the villeine will grant or alien the reversion to another in the life of the tenant for life, &c.

"**P**UIT maintenant vender a la terre."

For he cannot claime the reversion but upon the land, and he by his comming upon the land for that purpose is no trespassor; because the law giveth him power to claim the reversion, lest he should be prevented, and claime he cannot, unless he commeth to the land. So likewise if the villeine purchase a seigniorie, rent, common, or any other freehold or inheritance, out of any lands or

[119. b.] tenements of another, the lord may lawfully come to the land to make his claime to the seigniorie, rent, or other profit out of the land. But if the villeine purchase a seigniorie, or a rent, common, or other inheritance issuing out of the land of the lord himselfe, it is said, that the seigniorie, rent, common, or such other inheritance, is extinguished in the lord's possession without any claime.

Vide 41 E. 3.  
tit. Audita querela 18.  
13 H. 4. tit.  
Execution 28.  
F. N. B. 104.  
1 H. 7. 15. b.

"Grant." Here must be intended an attornment; for after the grant and before attornment the lord may not (1) claime the reversion (2).

"En

(1) This is apparently an error of the press, the sense requiring the omission of *est*. Accordingly the first edition is with-

out it. But the error appears in all the subsequent editions.

(2) [See Note 166.]

"*En la vie del tenant pur vic, &c.*" Here by (*&c.*) is included tenant in taile, tenant *pur auter vic*, tenant by statute merchant, staple, *elegit*, and for yeares; for during all these estates the lord may claime the reversion, as well as in case of the tenant for life.

## Sect. 180.

**E**N mesme la maner est, lou un villain purchase un advowson d'un esglise plein d'un incumbent, le seignior del villain poit venir al dit esglise, et claime le dit advowson, et per cel claime l'advowson est en luy. Car s'il doit attendre tanque apres le mort l'incumbent, et adonque a presenter son clerke a le dit esglise, donque, en le meane temps, le villaine poit alienner le advowson (3), et issint ouster le seignior de son presentment.

**I**N the same manner it is, where a villeine purchases an advowson of a church full of an incumbent, the lord of the villeine may come to the said church, and claime the said advowson, and by this claime the advowson is in him. For if he will attend till after the death of the incumbent, and then to present his clerke to the said church, then, in the mean time, the villein may alien the advowson, and so oust the lord of his presentment.

13 H. 14. b.

Fleta, lib. 5. cap. 14.

"**ADVOWSON**," *Advocatio*, so called, because the right of presenting to the church was first gained by such as were founders, benefactors, or maintainers of the church; viz. *ratione fundationis*, as where the ancestor was founder of the church; or *ratione donationis*, where he endowed the church; or *ratione fundi*, as where he gave the soile, whereupon the church was built. And therefore they were called *advocati*. They were also called *patroni*, and thereupon the advowson is called *jus patronatus*. And in one word, advowson of a church is the right of presentation or collation to the church. *Advocatus est ad quem pertinet jus advocationis alicujus ecclesie, ad ecclesiam nomine proprio, non alieno, possit presentare*. Every church is either presentative, collative, donative, or elective. *Vide* Section 643. 648.

24 E. 3. 30.  
25 E. 3. 47.  
38 E. 3. 9.  
44 E. 3. 3.  
9 H. 6. 31.  
23 H. 6. 27.  
31 E. 4. 34. b.  
*Vide* Sect. 648.  
(Foot. 344. a.)

20 H. 6. 7.

"**Plein d'un incumbent.**" If the church be presentative, the church is full by admission and institution against any common person; but against the king it is not full untill induction.

"**Incumbent**" commeth from the verbe *incumbo*, that is, to be diligently resident, *id est, obnixè operam dare*; and when it is written *incumbent*, it is falsely written, for it ought to be *incumbent*, as *Littleton* doth here (4). And therefore the law doth intend him to be resident on his benefice.

"**Le seignior del villeine poit venir a l'esglise, et claime le dit advowson.**" Note, albeit the advowson is a thing incorporeall, [120. a.] and not visible, yet because the principall duty of the presentee of the patron

(3) *Uc. L. and M.*(4) However, in L. and M. and Roh. the word is *encombent*.

patron is to be done in the church, the claime of the lord of the villeine must be made there ; and by that claime the inheritance of the advowson shall be vested in the lord ; for every claime or demand to devest any estate or interest must be made in that place which is most apt for that purpose.

"*Après la mort del incumbent.*" *Nota*, a church presentative may become void five manner of wayes, viz. 1. By death, whereof *Littleton* here speaketh. 2. By creation. 3. By resignation. 4. By deprivation. 5. By cession, as by taking a benefice incompatible.

"*Et donques a presenter son clerke al dit eglise, &c.*" A presentation is derived à *presentando* ; quia *presentare nihil aliud est quàm præsto, dare, seu offerre*. And *Littleton* here briefly expresseth the effect of a presentation ; for it is the act of the patron offering his clerke to the bishop of that diocese, to be instituted to such a church, in these or the like words directed to the bishop, *Præsto vobis A. B. clericum meum ad ecclesiam de Dale, &c.* This may be done as well by word, as by writing ; and if it be by writing it is no deed, for the presentation is of the clerke, and the direction to the bishop, so as this writing is in nature of a letter to the bishop ; and this is the reason that the king himselfe may present by word, as elsewhere is said. A villein at this day purchaseth an advowson in fee, the church becomes voide, the lord for one hundred pound given by *A. B.* clerke presents him to the church, and his clerke is admitted, instituted, and inducted ; yet this gaineth not the advowson to the lord [d]. And so it is in that case, if any on the behalfe of *A. B.* had given or contracted with the lord in consideration of any valuable thing to present *A. B.* to the said church, albeit it had beene without the consent or knowledge of *A. B.* yet it should not have vested the advowson in the lord. But this was not law when *Littleton* wrote. [e] But now by the statute of 31 *Eliz.* the presentation, admission, institution, and induction in both the said cases, and in the like are made voide (1), where before the said statute they were but voidable by deprivation (2). And if a man present by usurpation to a benefice, by reason of any corrupt contract, agreement, &c. that presentation and the institution and induction thereupon are void ; for that act extends to all patrons as well by wrong as by right. But where any presents by usurpation, the rightfull patron, and not the king, shall present ; for otherwise every rightfull patron may lose his presentation. And such an incumbent, that commeth in by reason of any such corrupt agreement, is so absolutely disabled for ever after to be presented to that church, as the king himselfe, to whom the law giveth the title of presentation in that case, cannot present him againe to that church ; for the act, being made for suppression of symony and such corrupt agreements, so bindes the king in that case, as he cannot present him that the law hath disabled (3) ; for the words of the act be, shall thereupon and from thenceforth be adjudged a disabled person in law to have or enjoy the same benefice.

Doct. & Stud.  
lib. 2. cap. 51.  
6 E. 3. 180.  
10 E. 3. 482.  
25 E. 3. 49.  
9 E. 3. 462.  
11 H. 4. 37. 89.  
76.  
41 E. 3. 5.  
F. N. B. 31, 32.

(3 Ro. Abr. 383.)  
[d] Adjudge in  
communi banco  
Mich. 41 & 42.  
Eliz. inter Baker  
& Rogers.  
[e] Adjudged in  
the King's Bench.  
Mich. 15 Ja. in a  
quar. imp. brought  
by the king against  
the bishop of Nor-  
wich, Thomas  
Cole and Robert  
Becker clerke,  
for the vicarage  
of Haverell in  
Suffolk.  
(Cro. Jam. 385.  
Hob. 75. Hob.  
165. 12 Co.  
100. 73.  
3 Inst. 183.  
1 Ro. Abr. 370.  
Cro. Jam. 385.  
533.  
Cro. Cha. 477.  
7 Co. 32.  
Post. 234.  
11 Co. 68.  
Cro. Cha. 331.)

(1) [See Note 167.]

(2) [See Note 168.]

(3) [See Note 159.]

[f] Pl. Com.  
302. 57 H. 8.  
2 H. 7. 6.  
11 H. 7. 11.  
13 H. 7. 8. b.  
11 H. 4. 76.  
8 E. 3. 39.  
F. N. B. 211. E.

fice. [f] And the party being disabled by the act of parliament (which being an absolute and direct law) cannot be dispensed withall by any grant, &c. with a *non obstante*; as it may be, when any thing is prohibited *sub modo*, as upon a penalty given to the king (4). And the said act doth not only extend to benefices with cure, but to dignities, prebends, and all other ecclesiastical livings.

4 H. 4. ca. 12.

"*Clerke*," *Clericus*, is twofold: *ecclesiasticus* (which *Littleton* here intendeth), and he is either secular or regular, so called because he is *servus et hereditas domini*: and *laicus*, and in this sense is signified a pen-man, who getteth his living in some court or otherwise by the use of his pen.

(Ante 117. a.),

[g] 14 H. 4. 12.  
30 E. 3. 36.  
13 E. 3. quare  
imp. 57.  
[h] 43 E. 3. 10.  
39 E. 3. 3.  
4 H. 6. 6.  
(Post. 351. a.  
1 Ro. Abr. 348.)

*Note*, if the church becommeth void, albeit the present avoidance be not by law grantable over, yet may the lord of the villeine present in his owne name, and thereby gaine the inheritance of the advowson to him and his heires; for albeit it be not grantable over, yet it is not meerly a chose in action; [g] for if a feme covert be seised of an advowson, and the church becommeth void, and the wife dyeth, the husband shall present to the advowson; [h] but otherwise it is of a bond made to the wife; because that it is merely in action.

## Sect. 181.

**I**TEM, il y ad villeine regardant, et villeine en gros. Villein regardant est, sicome home est seisie d'un mannor a que un villein est regardant, et celuy que est seisie del dit mannor, ou ceuz que estate il ad en mesme le mannor, ount este seisies de le dit villein et de ses auncestors come villeins et niefs (1) regardants a mesme le mannor de temps dont memorie ne curt. Et villeine en grosse est, lou un home seisie d'un mannor a que un villeine est regardant, et il graunt mesme le villein per son fait a un autre, donques il est villein en grosse, et nemy regardant.

**A**LSO, there is a villeine regardant, and a villeine in grosse. A villein regardant is, as if a man be seised of a mannor to which a villeine is regardant, and he which is seised of the said mannor, or they whose estate he hath in the same mannor, have beene seised of the villein and of his ancestors as villeins and niefs regardant to the same mannor time out of memory of man. And villein in grosse is, where a man is seised of a mannor whereunto a villein is regardant, and granteth the same villein by his deed to another, then he is a villein in grosse, and not regardant.

13 H. 7. 5.

"*VILLEIN regardant*." He is called regardant to the man-  
nour, because he hath the charge to do all base  
or villenous services within the same, and to gard and keep [120. b.]  
the same from all filthie or loathsome things that might annoy it;  
and his service is not certaine, but he must have regard to that  
which is commanded unto him. And thereupon he is called  
regardant, a quo *præstandum servitium incertum et indeterminatum*,  
ubi

Braet. li. 2. fo. 96.  
Mir. ca. 2. sect. 18.

[120. b.]

(4) [See Note 170.]

(1) *et niefs* not in L. and M.

*ubi scire non poterit vespere quale servitium fieri debet mane, viz. ubi quis facere tenetur quicquid ei præceptum fuerit, as before hath beene observed. And Littleton sayth, hereafter, that no other thing is said to be regardant, but onely a villeine; [i] yet in old bookes it was sometimes applyed to services.*

Vide Sect. 84.

[?] 20 E. 3. tit. Issue 30.

“*In grosse*,” is that which belongs to the person of the lord, and belongeth not to any mannor, lands, &c.

## Sect. 182.

**I**TEM, si un home et ses ancestors, que heire il est, ont este seises d'un villeine et de ses ancestors come des villeins en grosse de temps dont memorie ne curt, tiels sont villeines en grosse.

**A**LSO, if a man and his ancestors, whose heire he is, have beene seised of a villeine and of his ancestors as of villeines in grosse time out of memorie of man, these are villeines in grosse.

**T**HIS needeth no explanation, but to add the saying of an ancient author. *Servage de home est subjection, issuant de cy grand antiquite, que nul franke ceſt poet estre trove per humane remembrance.*

Mir. ca. 2. sect. 18.

## Sect. 183.

**E**T hic nota, que tiels choses, que ne poient estre grants, ne alienees, sans fait ou fine, home que voile aver tiels choses per prescription, ne poet auterment prescriber forsque en luy et en ses auncesters, que heire il est, et nemy per ceux parols, En luy et en ceux que estate il ad; pur ceo que il ne poet aver lour estate sans fait ou auter escripture, le quel corient d'estre monstre a le court, si il voile aver ascun advantage de ceo. Et pur ceo que le grant et alienation d'un villeine en gross (3) ne gist sans fait, ou autre escripture, home ne poit prescriber en un villein en gros; sans monstrans d'escripture, sinon en soy mesme que claime le villeine, et en ses ancestors que heire il est. Mes de tiels choses, que sont regardants ou appendants a un mannor, ou a auters terres et tenements, home poet prescriber, que il et ceux que estate il ad, queux fueront seises de le mannor, ou de tiels terres

**A**ND heere note, that such things, which cannot be granted, nor aliened, without deed or fine, a man which will have such things by prescription, cannot otherwise prescribe but in him and in his auncesters, whose heire he is, and not by these words, In him and them whose estate he hath; for that he cannot have their estate without deed or other writing, the which ought to be shewed to the court, if he will take any advantage of it. And because the grant and alienation of a villeine in grosse lyeth not without deed, or other writing, a man cannot prescribe in a villein in grosse, without shewing forth a writing, but in himselfe which claims the villeine, and in his auncestours whose heire he is. But of such things, which are regardant or appending to a mannour, or to other lands and tenements, a man may prescribe, that

(3) en gros not in L. and M. nor Roh.

*terres et tenements, &c. ont este seises de tiels choses come regardants ou appendants a le mannor, ou a tiels, terres et tenements (4) de temps dont memorie, &c. (5) Et la cause est pur ceo que tiel manor, ou terres et (1) † tenements poient passer per alienation sans fait, &c.*

that he and they whose estate he hath, who were seised of the mannor, or of such lands and tenements, &c. have been seised of those things, as regardant or appendant to the manor, or to such lands and tenements time out of mind of man. And the reason is, for that such manor or lands and tenements may passe by alienation without deed, &c.

Vide Sect. 441.

104. 174. 74.

[f] Bract. li. 5.

tract. s. c. 28.

(Post. 262. a.)

[m] Glauv. li. 8.

ca. 1.

[n] 9 Co. cap. 3.

Statut. de modo

levandi fines Pl.

Com. 357.

(3 Co. 84.

8 Co. 51.)

8 Co. fol. 32.

Tegres case.

[o] 22 Ass. 53.

23 Ass. 6.

13 H. 7. 16. 18.

(Doct. Plac. 302,

303, 304.)

[p] 30 H. 6. 8.

18 E. 4. 23.

[q] 11 H. 4. 89.

19 E. 2. Action

sur le case 51.

13 E. 3. Br. 674.

(Cro. Jam. 673.

10 Co. 59. b.)

[r] 9 E. 4. 3. b.

39 Ass. 19.

2 H. 6. 10.

48 E. 3. tit. 33.

3 H. 6. 28.

(Bro. Que estate

3.)

[s] 41 Ass. 2.

40 Ass. 28.

2 H. 4. 20.

15 E. 4. 1.

8 H. 7. 39.

18 E. 4. 10. 7 E. 6. tit.

Que estate Br. 31. 27 H. 6. 3. 7 El. Dyer 238. (1 Co. 46. 1 Sid. 298. Doe. Plac. 304.)

[t] 22 H. 6. 34.

6 E. 4. 12.

31 H. 6. Que

estate Br. 48.

39 H. 6. 14.

9 H. 6. Estop. 25.

“*O* fine,” in Latine, *fnis*. [f] *Ideo dicitur finalis concordia ; quia imponit finem litibus, et est exceptio peremptoria.* [m] *Finis est amicabile compositio et finalis concordia, ex consensu et licentia domini regis, vel ejus justiciariorum* (1). [n] *Talis concordia finalis dicitur, eo quod finem imponit negotio, adeo* [121.a.] *ut neutra pars litigantium ab eo de cetero poterit recedere* (2). Of the severall parts of a fine, and many incidents to the same, you shall reade in my Reports.

“*Que estate, &c.*” *Quorum statum*, as much as to say, whose estate he hath. Here *Littleton* declareth one excellent rule, [o] that a man cannot prescribe in any thing by a *que estate*, that lyeth in grant, and cannot passe without deed or fine ; but in him and his ancestors he may, because he comes in by descent without any conveyance. Neither can a man plead a *que estate* in himselfe of any thing that cannot passe without deed ; [p] but in another he may, as in barre of an avowry, the plaintife may plead a *que estate* in the seigniory in the avowant. But *Littleton's* words are to be observed, (*home que voile aver tiels choses per prescription*). Therefore [q] when a thing that lyeth in grant, is but a conveyance to the thing claimed by prescription, there a *que estate* may be alledged of a thing that lyeth in grant ; as a man may prescribe, that he and his ancestors, and all those whose estate he hath in an hundred, have time out of minde, &c. had a leet, &c. this is good, &c.

[r] Regularly the plaintife shall not intitle him by a *que estate*, but he must shew how he came by it ; but after avowry made, the plaintife shall plead a *que estate*, because he is now become as a defendant.

[s] A man may plead a *que estate* of a tenancy in taile, or of an estate for life, so as he averreth the life of them ; but he cannot plead a *que estate* of a lease for yeares (6), or at will.

[t] A disseisor, abatour, intruder, recoveror, or any other that cometh in the *post* shall plead a *que estate*. [121.b.]

A *que*

(1) [See Note 171.]

(2) [See Note 172.]

(4) &c. in L. and M. and Roh.

(5) court instead of &c. in L. and M. and

Roh.

(6) But see 1. Lev. 100. and 1. Sid. 298.

(1) † *av* instead of *et* in L. and M.

[u] *A que estate* must be alledged in the tenant or defendant himselfe, and not in one in the meane conveyance, from whom he claimeth; and yet some bookes be to the contrary.

“*Le quel covient d'estre monstre al court.*” The reason wherefore a deed, that is pleaded, ought to be shewed to the court is, because every deed must prove itselfe to have sufficient words in law, whereof the court must adjudge: and also to be proved by others, as by witnesses or other prooffe, if the deed be denyed, which is matter of fact.

“*Per alienation sauns fait, &c.*” Here by (*&c.*) is implied, that whatsoever passeth by livery of seisin, either in deed or in law, may passe without deed; and not only the rents and services parcell of the mannor shall within the demeanes, as the more principall and worthy, passe by livery without deed, but all things regardant, appendant, and appurtenant to the mannor, as incidents or adjuncts to the same, shall, together with the mannor, passe without deed; all which, as here it appeareth, and elsewhere is said, shall passe, without saying *cum pertinentiis* (2).

[u] 11 H. 4. 81.  
27 H. 6. 32.  
9 E. 4. 3.  
2 E. 6. tit. Quo  
estate 2.  
1 E. 6. Quo est  
Br. 49.  
(Cro. Cha. 84.  
1. Lev. 190.)

## Sect. 184.

**E***T est ascavoir, que nul chose est nosme regardant a un mannor, &c. forsque villeine. Mes certeine auters choses come advowson et common de pasture, &c. sont nosmes appendants al mannor ou al terres et (3) tenements, &c.*

**A**ND it is to be understood, that nothing is named regardant to a mannor, &c. but a villeine. But certaine other things, as an advowson and common of pasture, &c. are named appendant to the mannor, or to the lands and tenements, &c.

“**R**EGARDANT:” *Vide* Sect. 181.

“*Appendants.*” Appendant is any inheritance belonging to another, that is superior or more worthy. In law it is called *pertinens*, *quasi invicem tenens*, holding one another; a word indifferent both to things appendant, and things appurtenant. The quality and nature of the things do make the difference. But regardant (as our author saith) is only applyed to a villeine. (\*) Appendants are ever by prescription (4); but appurtenants may be created in some cases at this day. (5) As if a man at this day grant to a man and his heires common in such a moore for his beasts leavant or couchant upon his mannor; or if he grant to another common of estovers or turbary in fee simple, to be burnt or spent within his mannor; by these grants these commons are appurtenant to the mannor, and shall passe by the grant thereof. In the civill law it is called *adjunctum* (6).

*Vide* Sect. 1.  
(\*) 5. Ass. 9.  
8 H. 7. 4. 5.  
28 H. 8.  
Dier 39. b.  
Pl. Com. 361.  
F. N. B. fol. 181.  
2. Ro. Abr. 66.  
5. Co. 17. b.)

If

(2) [See Note 173.]

(3) *ou for et in L. and M.*

(4) See note 2. to 122. a

(5) Acc. 1 Ventr. 407.

(6) [See Note 174.]

[x] 43 Ass. p.  
10. 43 E. 3. 22.  
(10. Co. 64, 65.  
2 Ro. Ab. 185.)

[x] If *A.* be seised of a mannor, whereunto the franchise of waife and stray and such like are appendant, and the king purchaseth the mannor with the appurtenances, now are the royall franchises reunited to the crowne, and not appendant to the mannor. But if he grant the mannor in as large and ample manner as *A.* had, &c. it is said, that the franchises shall be appendant (or rather appurtenant) to the mannor.

[y] Hill and  
Grange's case,  
Pl. Com. 168.

Concerning things appendant and appurtenant, two things are implied [y].

First, that prescription (which regularly is the mother thereof) doth not make any thing appendant or appurtenant, unlesse the thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtenant; as a thing corporeall cannot properly be appendant to a thing corporeall, nor a thing incorporeall to a thing incorporeall (7). But things incorporeall which lye in grant, as advowsons, villeins, commons, and the like. may be appendant to things corporeall, as a mannor house or lands; or things corporeall to things incorporeall, as lands to an office. [z] But yet (as hath been said) they must agree in nature and quality; for [a] common of turbary or of estovers cannot be appendant or appurtenant to land, but to a house to be spent there. [b] Nor a leet, that is temporall, to a church or chappell, which is ecclesiasticall. Neither can a nobleman, esquire, &c. claime a seat in a church by prescription as appendant or belonging to land, but to a house, for that such a seat belongeth to the house [122. a.] in respect of the inhabitancy thereof; and therefore, if the house be part of a mannor, yet in that case he may claime the seat as appendant to the house for the reason aforesaid.

(1 Rol. Abr. 230.)  
[z] 1 H. 7. 24.  
Pl. Com. 169.  
[a] 5 Ass. 9.  
(1 Sid. 354.)

[b] 10 E. 3. 5.  
37 H. 6. 34.  
26 H. 8. 4.  
4 Co. 36, 37.  
in *Tirringham's*  
case.

(12 Co. 104.)  
4 E. 6. Dier.  
70. b.  
(1 Rol. Abr. 230.)

Secondly, that nothing can be properly appendant or appurtenant to any thing, unlesse the principall or superior thing be of perpetuall subsistence and continuance. For example, an advowson that is said to be appendant to a mannor, is *in rei veritate* appendant to the demesnes of the mannor, which are of perpetuall subsistence and continuance, and not to rents or services, which are subject to extinguishment and destruction (1).

(1 Rol. Abr. 230.)

An advowson is appendant to the mannor of *Dale*, of which mannor the mannor of *Sale* is holden, the mannor of *Sale* is made parcel of the mannor of *Dale* by way of escheat, the advowson is only appendant to the mannor of *Dale*.

And where it is said, that a chamber may be parcell of a corody, and passe by the name of the corody, which may be extinguished, there he that hath the corody, hath but his habitation in the chamber; as a fellow of *Trinity* colledge in *Cambridge* hath in his chamber, or as one that had a corody and a chamber in an house of religion, he had but his habitation only. As for offices of fee whereunto land may appertain, they are of perpetuall subsistence, either being *in esse*, or in that they are grantable over.

31 H. 6. 15. b.  
13 E. 2. Quar.  
imp. 170.  
43 E. 3. 35.  
13 E. 3. Quar.  
imp. 58.  
17 E. 3. 38.  
9 Eliz. Dier 259.  
7 E. 3. 20.

Note, that an advowson at one turne may be appendant, and at another turne in grosse. As if the mannor be divided betweene coparceners, and every one hath a part of the mannor without saying any thing of the advowson appendant, the advowson remaines in coparcenary, and yet, in every of their turnes, it is appendant to that part which they have; and so it is, if they make composition to present

[122. a.]

(7) [See Note 173.]

(1) [See Note 176.]



present against common right, yet it remains appendant. But if upon such a partition an expresse exception be made of the advowson, then the advowson remains in coparcenarie and in grosse, and so are the bookes reconciled.

19 E. 3. Quar.  
imp. 59.  
35 H. 6. 32, 33.  
38 H. 6. 9.  
2 H. 7. 5.  
(6 Co. 64. a.)

“*Common de pasture.*” [c] *Communia*, it cometh of the *English* word common, because it is common to many; and thereupon and accordingly is here called by *Littleton* common of pasture, for that the feeding of beasts in the land wherein the common is to be had belongs to many.

[c] Glanvill.  
lib. 3. ca. 36.  
Bract. lib. 4.  
c. 19. &c. 43.  
Brit. cap. 55, 56, 57.  
Fleta, lib. 4. ca. 19.  
Mirror, ex. 5. sect.  
3.

[d] There be foure kinds of common of pasture, viz. common appendant, which is of common right, (and therefore a man need not prescribe for it) (2) for beasts commonable (that is) that serve for the maintenance of the plough, as horses and oxen to plough the land, and for kine and sheepe to compester the land, and is appendant to arrable land (3).

[d] 20 E. 3.  
Admeasurement  
8 Temps E. 1.  
Common 24.  
17 E. 2. ibid. 23.  
4 H. 6. 22 H. 6.  
(1 Rol. Abr. 396.  
Cro. Cha. 542.  
6 Co. 69.)

[e] The second is common appurtenant, that is, for beasts not commonable; as swine, goats, and the like. [f] If a man purchase part of the land wherein common appendant is to be had, the common shall be apportioned, because it is of common right; but not so of a common appurtenant, or of any other common of what nature soever. But both common appendant and appurtenant shall be apportioned by alienation of part of the land to which common is appendant or appurtenant; and for common appurtenant one must prescribe (4).

[e] 37 H. 6. 34.  
26 H. 8. 4.  
F. N. B. 181.  
(Dier 70. b.)  
[f] 4 Co. f. 37.  
38. &c. Tiring-  
ham's case.  
(Hob 235.  
1 Rol. Abr. 399.  
Cro. Cha. 482.  
Cro. El. 631.)

[g] The third is *common per cause de vicinage*, which differeth from both the other commons, for that no man can put his beasts therein, but they must escape thither of themselves by reason of vicinity; in which case one may inclose against the other, though it hath bene so used time out of mind, for that it is but an excuse for trespass.

[g] 8. Co. 78, 79.  
W. Wilde's case.  
(7 Co. 5. Corbet's  
case.)

The last is common in grosse, which is so called, for that it appertaineth to no land, and must be by writing or prescription. Of common appendant, appurtenant, and in grosse, some be certaine, that is, for a certaine number of beasts; some certaine by consequent, viz. for such as be levant and couchant upon the land; and some be more incertaine, as commons *sauns nombre* in grosse, and yet the tenant of the land must common or feed there also (5).

(1 Saund. 345.)

There be also [h] divers other commons, as of estovers, of turbary, of pishary, of digging for coles, minerals, and the like. [i] If common appendant be claymed to a mannor, yet *in rei veritate* it is appendant to the demesnes, and not to the services; and therefore if a tenancy escheate, the lord shall not encrease his common by reason of that. [k] If a man claime by prescription any manner of common in another man's land, and that the owner of the land shall be excluded to have pasture, estovers, or the like, this is a prescription or custome against the law, to exclude the owner of the soyle; for it is against the nature of this word common, and it was implied in the first grant, that the owner of the soyle should take his reason-

[h] Fleta, ubi  
supra.  
[i] 18 E. 3. fol. 43.

[k] 18 E. 2.  
Prescript. 51.  
12 H. 8. fol. 2.  
(Cro. Jam. 208.  
257 1 Ro.  
Abr. 396.  
2 Rol. Abr. 267.  
7 Co. 5.  
1 Vent. 391.  
1 Saund. 351.)

(2) [See Note 177.]

(4) [See Note 178.]

(3) See Fulb. Prepar. 68. b. and 1.  
Saund. 351.

(5) [See Note 179.]

[\*] Pasch. 36.  
 Eliz. in the King's  
 Bench, inter White  
 & Shirland in  
 com. Oxon. Vide  
 Sect. 1. & 2.  
 (F. N. B. 180.  
 c. 2. Saund. 336.  
 2 Rol. Abr. 406.)  
 [†] Vid. 3 E. 3,  
 29, 30.  
 4 E. 3. 7.  
 46 E. 3. 23.  
 15 E. 2.  
 Prescript. 51.  
 [m] 30 H. 6. 4.  
 10 H. 7. 24.  
 Temp. E. 1.  
 Assise 422.  
 (2) Rol. Abr. 259.)  
 [\*] Inter Chinery  
 & Fishen in le Com. Banke in replevin, & Mich. 29 & 30 Eliz. inter Shirland and White in com. Oxon. et inter Foiston  
 & Crachrode eodem termino in Essex. (2. Rol. Abr. 267.)

able profit there, as it hath beene adjudged. [\*] [†] But a man may prescribe of alledge a custome to have and enjoy *solum vestruram terræ*, from such a day till such a day, and hereby the owner of the soyle shall be excluded to pasture or feed there (6); and so he may prescribe to have *separalem pasturam*, and exclude the owner of the soyle from feeding there. *Nota diversitatem*. [m] So a man may prescribe to have *separalem piscariam* in such a water, and the owner of the soyle shall not fish there; but if he claim to have *communiam piscariam*, or *liberam piscariam*, the owner of the soyle shall fish there (7). And all this hath been resolved. [\*] And there fore it is necessary for every man by learned advice to plead [122. b.] according to the truth of his case; for *parola font plea*.

[n] 19 H. 6. 33.

[n] A man seised of land whereunto common is appendant, and is disseised, the disseisee cannot use the common, until he entreth into the land whereunto it is appendant. [o] But if a man be disseised of a manor whereunto an advowson is appendant, he may present unto the advowson, before he enters into the manor; and the reason of this diversity is, because in the case of the common it should be a prejudice to the tenant of the soyle: for if the disseisee might do it, the disseisor also might put on his cattle, which should be a double charge to the tenant, but not so of the advowson.

[o] Vide Sect. 241.  
 (4 Co. 31. a.  
 Fort. 307. 349. b.  
 362. b.)

## Sect. 185.

**ITEM**, si home voile en court de record soy conuuster d'estre villeine, que ne fuit villein adevant, tiel est villeine en grosse.

**ALSO**, if a man will acknowledge himselfe in a court of record to be a villeine, who was not a villein before, such a one is a villeine in grosse (1).

Bract lib. 1.  
 cap. 6.  
 Britton, fol. 78.  
 Fleta, l. 1. c. 3.  
 43 E. 3. 4. b.  
 19 E. 2. tit.  
 VII. 34.  
 18 E. 4. 29.  
 [p] 19 H. 6. 32.  
 20. Ass. 62.  
 57. Ass. 17.  
 11 H. 4. 16. in  
 appale.  
 (2. Ro. Abr. 132.)  
 41 E. 3. tit. VII. 6.

**T**HIS is intended in some action brought against him that made such confession, [†] or where he is brought into court by course of law; for if he cometh into the court extrajudicially, and not by any due course of law, such confession is without warrant of law, and bindeth not the partie, because the court had no warrant to take it. But if a *præcipe* be brought against one, he may confesse himselfe villeine to an estranger, and that he holds the land in villenage of him, and this is good and shall bind him. And if in that case the demandant reply, that he the day of his writ purchased was a freeman (2), and thereupon issue is taken, and he is tryed to be free, yet he shall remaine villeine to the stranger in respect of his confession.

If a writ of *nativo habendo* be brought against one, and the plaintiffe, as he ought, offereth in his count to prove the villenage by the cousins

19 H. 6. 32. b.

[122. b.]

(6) [See Note 180.]  
 (7) [See Note 181.]

(1) [See ante 117. b. n. 3:]  
 (2) [See Note 182.]

cousins and kindred of the defendant, and thereupon produceth the uncles of the defendant, who upon examination, confesse themselves to be villeines to the demandant; this confession, being entred of record, doth so bind, that, albeit if they were so free before, they and the heires of their bodies are by this confession bond and villeines for ever, for the uncles came in by due course of law in an action depending in court.

## Sect. 186.

**I**TEM, *home que est villain est appelle villeine (3), et feme que est villain est appelle niece : sicome home que est utlage est dit utlage, et feme que est utlage est dit waive.*

**A**LSO, a man which is villeine is called a villeine, and a woman which is villain is called a niece; as a man which is outlawed is called outlawed, and a woman which is outlawed is called waived.

**"NIEFE,"** or *Naife*, is in *Latine naturalis, seu nativa*, because for the most part niefes are bond by nativitie.

*"Feme que est utlage est dit waive."*

*Waive, waiviata*, and not *utlagata* or *exlex*, for that women are not sworne in leets, or tornes, as men which be of the age of twelve yeares or more be: and therefore men may be called *utlagati, id est, extra legem positi*, but women are *waiviata, id est, derelicta*, left out or not regarded, because they were not sworne to the law; wherein it is to be noted, that of ancient time a man was not said to be within the law, that was not sworne to the law, which is intended of the oath of allegiance in the leet (4).

And the outlawrie of a woman is legally called *waiviaria mulieris*.

F. N. B. 161. a.  
Regist. 132. &  
377. Britton,  
fol. 30.  
Bract. l. 3.  
tract. 2. ca. 12.  
13 Fleta, lib. 1.  
cap. 23. 3 H. 5.  
tit. Outlawry  
Santham.  
Regist. orig. 132.  
(2 Rot. Abr. 304.)

[123. a]

## Sect. 187.

**I**TEM, *si un villain prent frank feme a feme, et ad issue enter eux, l'issues serront villeines. Mes si niece prent franke home a sa baron, lour issues serra franke.*

\* *Et c'est contrarie a le ley civil; car la est dit, partus sequitur ventrem\**. (1).

**A**LSO, if a villeine taketh a free woman to wife, and have issue betweene them, the issues shall be villeines. But if a niece taketh a freeman to her husband, their issue shall be free.

\* This is contrarie to the civill law; for there it is said, *partus sequitur ventrem\**.

**"SURCULUS**

(3) *et nies* in L. & M. & Roh.

(4) See ante 68. b. n. 1, 2. to which add post. 172. b. Spelm. Gloss. voc. *Fidelitas*. 2. Inst. 73. Britt. cap. 29. Cow. Inst. 1. 2. t. 3. s. 14. Flet. 1. 2. c. 52. 1. 3. c. 16. Mirr. c. 3. sect. 35. 7 Co. 6. b. 7. a. Calvin's case Tyrr. Biblioth. Polit.

4th ed. 907. Ellesmere's argument in Calvin's case 76.

[123. a.]

(1) The sentence between the stars is not in L. and M. Roh. or P.

Fortescue, cap. 42. Glanv. lib. 2. cap. 6. Hill. 29 E. 1. coram rege Eborum in thesaur. [q] Lib. Rub. cap. 77.

[r] Fortescue, ubi supra.

[r] Herewith agreeth Britton, fol. 78. b.

[r] Bract. lib. 4. fol. 298. b. Idem, lib. 1. cap. 6. Mirror, cap. 2. sect. 28.

[u] Bract. lib. 4. fo. 271.

[x] Glanvill lib. 5. cap. 6.

Fortescue, cap. 42.

“**S**URCULUS totum alimentum à stipite capit, poma tamen edit sua.” The siens (2) takes all his nourishment from the stocke, and yet it produceth his own fruit.

[q] *Si quis de servo patre natus sit et matre liberâ, pro servo reddatur occisus in eâ parte; quia semper à patre non à matre generationis ordo textitur. Si pater sit liber et mater ancilla, pro libero reddatur occisus. [r] Lex Angliæ nunquam matris, sed semper patris, conditionem imitari partum judicat.*

[s] The husband and wife are all one person in law, and the niese marrying a freeman is infranchised during the coverture (3); and therefore by the common law of England, the issue is free (4).

[t] *Si mulier sirva copulata sit libero, &c. quòd partus habebit hæreditatem, et mater nullam dotem, quia mortuo viro suo libero redit in pristinum statum servitutis, nisi hæres ei dotem fecerit de gratiâ (5).* And when a bondman marieth a free woman, they are all one person in law, and *duæ anime in carne unâ*, and *uxor subiecta est viro, et sub potestate viri (6).*

[u] *Observatur in com' Cornubiæ de tali consuetudine, quæ talis est, quòd si liber homo ducat nativam aliquam in uxorem ad liberum tenementum et liberum thorum, si ex eâ duæ procreantur filiæ, una erit libera et altera villana, quia ibi partiti sunt pueri inter liberum patrem et dominum uxoris villanæ.*

[x] *Qui verò procreantur ex nativa unius et nativo alterius, proportionabiliter inter dominos sunt dividendi.*

“*Et ceo est contrarie al ley civil.*” (7) For true it is, that by that law *partus sequitur ventrem*, as well where a free man takes a bond woman to wife, as where a bondman takes a free woman to wife. In the first case the issue is by the civill law bond, and in the other free; both which cases are contrarie to the law of England. But this is no part of *Littleton*; and therefore we in this manner pass it over.

## Sect. 188.

**I**TEM, nul bastard poit estre vil-  
lein, si non que il voile soy conu-  
ster estre villeine en court de re-  
cord; car il est en ley quasi nullius  
filius, pur ceo que il ne poit enheriter  
a nulluy.

**A**LSO, no bastard may be a vil-  
leine, unless he will acknow-  
ledge himselfe to be a villeine in a  
court of record; for he is in law  
quasi nullius filius, because he can-  
not be heire to any.

[a] Vide Sect. 399. 13 E. 1. tit. Villein. 36. (Ante 3. b. Post 244. b.) [b] Bract. lib. 1. fo. 8. a. Fleta, lib. 1. cap. 3. Britton, fol. 78. [c] 39 E. 3. 34. 43 E. 3. 4. Britton, ubi supra.

“**N**ULLIUS [a] filius.” *Cui pater est populus, pater est sibi nullus et omnis.*

*Cui pater est populus, non habet ille patrem.*

[b] Some hold that the bastard of a niese shall be a villeine. [c] And others hold, that if a villeine hath a bastard by a woman, and after marieth the woman, that this bastard is a villeine. But the law is contrary in both cases; for in both cases, the issue by the common

(2) [See Note 183.]

(3) [See Note 184.]

(4) [See Note 185.]

(5) [See Note 186.]

(6) [See Note 187.]

(7) [See Note 188.]

common law is a bastard, and consequently, *quasi nullius filius*, as *Littleton* here saith. [d] Though a bastard be a reputed sonne, yet is he not such a sonne, in consideration whereof an use can be raysed, for the reason that *Littleton* here yeelds; because in judg-

[123. b.] ment of law he is *nullius filius*. [e] (8) And, for the same reason, where the statute of 32 H. 8. of wills, speaketh of children, bastard children are not within that statute, and the bastard of a woman is no child within that statute, where the mother conveys lands unto him.

[f] It was found by verdict, that *Henry* the sonne of *Beatrice*, which was the wife of *Robert Radwell* deceased, was born *per undecim dies post ultimum tempus legitimum mulieribus constitutum*. And thereupon it was adjudged, *quod dictus Henricus dici non debet filius predicti Roberti secundum legem et consuetudinem Anglie constitut* (1). Now *legitimum tempus* in that case appointed by law at the furthest is nine moneths, or forty weeks (2); but she may be delivered before that time, which judgement I thought good to mention. And this agreeth with that in *Esdra: Vade et interroga pregnantem, si quando impleverit novem menses suos, adhuc poterit matrix ejus retinere partum in semetipsa? Et dixi, Non potest, domine*.

[d] 23 Eliz.  
Dier 374.

[e] 13 Eliz.  
Dier 390.  
14 Eliz. Dier.  
313. 18 Eliz.  
Dier 345.

[f] Trin. 18 E.  
2. rot. 61. Hedf.  
coram rege.  
(Cro. Jam. 541.  
1. Roll. Abr.  
336. Godb. 281.  
Palm. 9.)

4. Esdras 4. 41.  
Vide Panciroli.  
Nova Reports, 1  
page 485, &c.

## Sect. 189.

**I**TEM, chescun villeine est able et frankede suer tous manners d'actions envers chescun person, forspris envers son seignior, a que il est villeine. Et uncore en certain choses il poit aver action envers son seignior. Car il poit aver envers son seignior un action d'appeal de mort son pere, ou d'autres de les auncesters, que heire il est.

**A**LSO, every villein is able and free to sue all manner of actions against everie person, except against his lord, to whom he is villeine. And yet in certaine things he may have against his lord an action. For he may have against his lord an action of appeale for the death of his father, or of his other ancestors, whose heire he is.

“**C**HESCUN villeine est able et franke de suer, &c. [g] In an action brought by a villeine *versus non dominum, non valebit ei exceptio, quia est servus alienus, ex quo nihil ad ipsum utrum liber sit an servus*. [h] And it is to be observed, that he that hath but a particular estate in a villeine, as tenant for life or for yeares, shall disable the villeine, if he brings an action against him; but the lessor shall not (as it is said) disable him. [i] *Examinatio villenagii non tenet, nisi ex ore veri domini fuerit pronuntiata*.

[g] Bract. lib. 4.  
fol. 196.  
Britton, cap. 49.  
fo. 125.

[h] 14 E. 4. c. b.  
15 E. 4. 32.  
20 E. 3. tit.  
Villein 10.  
33 E. 2. 21.  
[i] Fleta, lib. 2.  
cap. 4.  
(3. Inst. 131.)

“*Appeale*,” *Appellum*, commeth of the French word *appeller*, that signifieth to accuse or to appeach. An appeach, [k] an appeale, is an accusation of one upon another, with a purpose to attaint him of felonie by words ordained for it.

[k] Brit. cap. 22.  
fo. 38. Bracton,  
lib. 1. fo. 6.

“*De mort*.” [l] For a villeine shall not have an appeale of roberie against his lord, for that he may lawfully take the goods of the villein

[l] 18 E. 3. 32.  
11 H. 4. 93.  
1 H. 4. 6.  
20 H. 6. c. 6.  
Corone 17.

[123. b.]

(8) [See Note 189.]

(1) [See Note 190.]

(2) [See Note 190\*.]

[m] *Fleta*, li. 1.  
c. 7. 1 H. 4. 4.

villein as his own. [m] And if in an appeale of death it be found for the plaintife, he is enfranchised for ever. *Hinc enim est, quod eo ipso sunt hujusmodi domini servos suos amissuri, cum de injuriis fuerint convicti.* And there is no diversitie herein, whether he be a villein regardant or in grosse, although some have said the contrary.

## Sect. 190.

**A**UXY, un nief, que est ravie  
per sa seignior, poit aver un ap-  
peale de rape envers luy.

**A**LSO, a nief that is ravished  
by her lord, may have an ap-  
peale of rape against him.

[n] *Mirror*, ca.  
1 sect. 12. c. 3.  
de Rape, 8. cap.  
4 de Homicide.  
(3 Inst. 60.)

“**R**APE,” [n] *Raptus*, is, when a man hath carnall knowledge of a woman by force and against her will.

[o] W. 1. ca. 12.  
W. 2. ca. 35.  
6 R. 2. ca. 6.  
11 H. 4. cap. 12.  
1 E. 4. cap. 1.  
[e] 29 H. 6. 11.  
tit. Coron. 17.  
*Bract*. lib. 3.  
fol. 147.

“*Appeale de rape.*” By the generall purview of the statutes [\*] that give the appeale of rape, the nief shall have an appeale of rape against the lord. [o] And it seemeth by the ancient authors of the law, that this so hainous an offence was severely punished by losse of eyes, and privy members; but of old time it was felony, which you may reade at large in the Second Part of the Institutes, W. 1. ca. 13.

[p] 9 E. 26.  
*Mirror*, ca. 1.  
sect. 13.

[h] And this word *rape*, which our author here useth, is so appropriated by law to this case, as without this word [124. a.] (*rahit*) it cannot be expressed by any periphrasis or circumlocution; for *carnaliter cognovit eam*, or the like, will not serve.

## Sect. 191.

**A**UXY, si un villein soit fait exe-  
cutor a un autre, et le seignior  
del villein fuit en dette a le testator  
en un certaine somme d'argent, que  
n'est my paie; en ceo case, le villeine,  
come executor de le testator, avera  
action de det envers son seignior; pur  
ceo que il ne recovers le det a son use  
demesne, mes al use le testator.

**A**LSO, if a villeine be made exe-  
cutor to another, and the lord  
of the villeine was indebted to the  
testator in a certaine sum of money,  
which is not paid; in this case, the  
villein, as executor of the testator,  
shall have an action of debt against  
his lord; because he shall not re-  
cover the debt to his owne use, but  
to the use of the testator.

(Doc. Plac. 322.)  
21 E. 4. 50. a.

**O**F this matter sufficient hath beene spoken in this Chapter before.  
The villein shall have an action as executor against his lord; and it is no plea for the lord to say, that the plaintife is his villeine; for he shall not be enfranchised by the user of this action; because he hath it by a gift in law to the use of the testator, and not to his owne use.

## Sect. 192.

**I**TEM, le seignior ne poit prendre hors del possession de tiel villein, que est executor, les biens le mort ; et s'il face, le villeine come executor avera action de trespasse de mesmes les biens issint prises envers son seignior, et recovers damages al use le testator. Mes en tous tielx cases il covient, que le seignior, que est defendant en tielx actions, face protestation, que le plaintife est son villein ; ou autrement le villeine serra enfranchise, coment que le matter soit trouve pur le seignior, et encounter le villein, come est dit.

**A**LSO, the lord may not take out of the possession of such villeine, who is executor, the goods of the deceased ; and if he doth, the villeine as executor shall have an action for the same goods so taken against his lord, and shall recover damages to the use of the testator. But in all such cases it behoveth, that the lord, which is defendant in such actions, maketh protestation, that the plaintife is his villein ; or otherwise the villeine shall be enfranchised, although the matter be found for the lord, and against the villein, as it is said.

**"L**E seignior ne poet prendre hors del possession, &c." Of this also sufficient hath been said before.

"Et recovers damages al use del testator." [q] Note, damages recovered by the executor in an action of trespasse shall be assets ; and yet they were never in the testator. And so it is in other like cases, as by our bookes it appeareth.

[q] 21 E. 4. 4.  
b. 11 H. 6. 35. b.  
3 H. 6. 2.  
2 H. 4. 21.  
1 H. 4. 6.

[r] Doct. &  
Stud. Brooke tit.  
Villenage 70.

(Ante 117. a.)

[124. b.] [s] tenant in taile and tenant for life of a villeine shall have the perquisite of the villeine in fee, but [t] tenant for years and tenant at will also shall have it in fee.

[s] L. 5 E. 4. 61.  
[t] 21 H. 3. 6. 37.  
(Ante 117. a.)

But the law respecteth the quality ; for in what right he hath the villeine, in the same right he shall have the perquisite ; as in the case of the executor abovesaid, and in the case of the bishop [u] that hath the villeine in right of his church, he shall have the perquisite in the same right.

[u] 41 E. 3. 21.

[x] So if a man hath a villeine in the right of his wife, he shall have the perquisite also in her right. But if the purchase be after issue had, then the baron shall have the perquisite to him and his heires ; because by the issue he is intituled to be tenant by the curtesie in his owne right.

[x] 13 E. 3. 29.

"Protestation," [y] *Protestatio*, is an exclusion of a conclusion that a party to an action may by pleading incurre ; or it is a safeguard to the party, which keepeth him from being concluded by the plea he is to make, if the issue be found for him. But in this case without a protestation, albeit the issue be found for the lord, the villeine shall be enfranchised, as it appeareth hereafter in this Section.

Vide Sect. 193.  
[y] Pl. Com.  
276 b. in Greis-  
brook's case.

## Sect. 193.

**I**TEM, si villeine suist un action de trespasse, ou un auter action, envers son seignior en un county; et le seignior dit, que il ne serra respondus, pur ceo que il est son villein regardant a son manor en auter county (1); et le plaintife dit, que il est franke, et de franke estate, et nemy villein: ceo serra trie en le county lou le plaintife avoit conceire son action, et nemy en le county lou le manor est: et ceo est in favorem libertatis. Et pur cel cause un estatute fuit fait an. 9 R. 2. cap. 2. le tenor de quel ensuist en tiel forme. Item, pur la ou plusieurs villeins, et niefes, sibien des grandes seigniors come des auters genies, sibien espirituels come temporals, s'enfuient deins cities, villes, et lieux enfranchise, come en la cite de Londres, et auters semblables, et feignont divers suits envers leur seigniors, a cause de eux faire franks per le respons de leur seigniors: accorde est et assentus, que les seigniors ne auters ne soyent myforbarres de leur villeines per cause de leur respons en ley. Per force de quelestatute, si aucun villein voyiloit suer ascun maner de action a son use demesne en ascun county, ou il est sort a trier envers son seignior, le seignior poyt estlyer de pleader, que le plaintife est son villeine, ou de faire protestation que il est son villeine, et de plader son auter matter en barre. Et si ils sont a issue, et l'issue soit troce pur le seignior, donque le villein est villein, come il fuit devant per force de mcsmes l'estatute. Mes si le issue soit troce pur le villeine, donque le villeine est franke; pur ceo que le seignior ne prist al commencement pur son plee, que le villeine fuit son villeine, mes ceo prist per protestation, &c.

for his plee, that the villeine was testation, &c.

**A**LSO, if a villeine sueth an action of trespasse, or any other action, against his lord in one county; and the lord saith, that he shall not be answered, because he is his villeine regardant to his mannour in another county; and the plaintife saith, that he is free, and of a free estate, and not a villeine; this shall be tryed in the county where the plaintife hath conceived his action, and not in the county where the mannour is: and this is in favour of liberty. And for this cause a statute was made anno 9 R. 2. ca. 2. the tenor whereof followeth in this forme. Also, for that where many villeins and niefs, aswell of great lords as of other men, aswell of spirituall as temporall, flye and go into cities, townes, and places franchised, as into the city of London, and other like places, and feine divers suits against their lords, because they would make themselves free by the answer of their lords: it is accorded and assented, that lords nor others shall not be forebarred of their villeins by reason of their answer in law. By force of which statute, if any villeine will sue any manner of action to his owne use in any countie, where it is hard to try against his lord, the lord may chuse whether he will plead, that the plaintife is his villeine, or make protestation that he is his villeine, and plead his other matter in bar. And if they be at issue, and the issue be found for the lord, then the villeine is a villeine, as he was before by force of the same statute. But if the issue be found for the villeine, then the villeine is free; because that the lord tooke not at the beginning his villeine, but tooke this by pro-

(1) &amp;c. in L. and M. and Roh.



"*CEO serra trie en le countrie, &c.*" Be tryed, that is, as it is intended, by the verdict of twelve men, that is called in law a triall, *triatio*.

[a] In this case the law doth favour the villein in the issue; for otherwise by the rule of law in like cases he ought to answer to the speciall matter, viz. to the regardancy; but in favour of liberty he may reply, that he is free and of free estate, and consequently this issue concerning the person shall be tryed where the writ is brought.

[b] The like law it is, if issue be joynd upon the ideocy of the plaintiff or defendant, it shall be tryed where the writ is brought, because it concerneth the person.

"*In favorem libertatis.*" It is commonly said, that three things be favoured in law; life, liberty, and dower.

[c] *Impius et crudelis judicandus est, qui libertati non favet. Angliæ jura in omni casu libertati dant favorem.*

Tryall is to finde out by due examination the truth of the point in issue or question betweene the parties, whereupon judgement may be given. And as the question betweene the parties is twofold, so is the triall thereof: for either it is *questio juris*, (and that shall be tried by the judges either upon a demurrer, special verdict or exception, for *cuiuslibet in sua arte perito est credendum; et quod quisque nōrit in hoc se exerceat*; and it is commonly and truly said, *ad questionem juris non respondent juratores*) or it is *questio facti* (1). And the triall of the fact is in divers sorts, whereof a light touch is given before, Sect. 102. Of these a triall by xii. men (here intended by *Littleton*) is the most frequent and common. And some few rules of law are necessary here to be remembered (for the better understanding of the bookes of law hereafter) where and from what place, viz. *de quo vicineto*, out of what neighbourhood the jury shall come, a necessarie point to be knowne; for if there be a mistryall, (that is) if the jury commeth out of a wrong place, or returned by a wrong officer, and give a verdict, judgement ought not to be given upon such a verdict. [d] Wherein the most general rule is, that every tryall shall be out of that towne, parish, or hamlet, or place known out of the towne, &c. within the record, within which the matter of fact issuable is alledged, which is most certaine and necest thereunto, the inhabitants whereof may have the better and more certaine knowledge of the fact (2). As if the fact be alledged in *quādam platca vocat' King-street in civitate Westm. in com' Midd.* in this case the visne cannot come out of the *platca*; because it is neither town, parish, hamlet, nor place out of the neighbourhood whereof a jury may come by law. But in this case it shall not come out of *Westminster*, but out of the parish of *St. Margaret*, because that is the most certaine. But therein also it is to be [125.b.] noted, that if it had been alledged in *King-street* in the parish of *St. Margaret* in the county of *Middlesex*, then should it have come out of *King-street*, for then should *King-street* have bene esteemed in law a towne [e]; for whensoever a place is alledged generally in pleading (without some addition to declare the contrary,

Brit. fol. 79.  
135. b. 126. a.

[a] 7 E. 80.  
26 E. 3. 78.  
38 E. 3. 34.  
40 E. 36.  
43 E. 3. 4. 31.  
44 E. 3. 36.  
47 E. 3. 36.  
22 H. 6. 52.  
35 H. 6. 12.  
39 H. 6. 24.  
Vide Sect. 534.  
[b] x Mar. Dier 112.  
(Post. 126. 7 Co. 1.)

(F. N. B. 77. L)  
[c] Fortescue  
cap. 42.

Vide Sect. 234.

Vide Sect. 102.

Vide Sect. 234.  
more of this matter.  
(5. Co. 47.  
5. Co. 36. b.  
Cro. Cha. 480.)

[d] 3 E. 3. 73.  
20 H. 6. 30.  
7 H. 4. 27. 9 H. 5. 2.  
8 H. 6. 34.  
7 H. 6. 27.  
17 E. 3. 56.  
43 E. 3. 5.  
47 E. 3. 6.  
34 H. 6. 1.  
(2. Roll. Abr. 618.  
Cro. Jam. 120. 326.  
513. 676. Hob. 76.  
9. Co. 66. b.  
11. Co. 25. b.  
6. Co. 14.)  
(7. Co. 1. 1. Sid.  
9. 88. Hob. 89.  
1 Sid. 10. 2. Ro.  
Abr. 609.  
1. Roll. Rep. 349.  
Cro. Ediz. 518.)

[e] 4 E. 3. 30.  
8 E. 3. 68.  
39 H. 6. 13.  
Brooke Pleading  
61.

as

(1) See post. 155. b. 228. a.

(2) [See Note 191.]

[f] 4 E. 4. 41.  
 5 E. 4. 30.  
 23 E. 4. 2.  
 35 H. 6. 30.  
 35 H. 6. 47.  
 1. Co. 162.  
 Digges' case.  
 11 Co. 25. 6. Co. 14.  
 (Hob. 150.  
 2. Roll. Abr. 616.)  
 [g] 1 E. 3. 2.  
 7 H. 6. 38.

as in this case it is) it shall be taken for a towne. [f] And albeit *parochia* generally alledged is a place incertaine, and may (as we see by experience) include divers townes; yet, if a matter be alledged in *parochia*, it shall be intended in law, that it containeth no more townes than one, unlesse the party doth shew the contrary. [g] But when a parish is alledged within a city, there without question the visne shall come out of the parish, for that is more certaine then the city.

[A] 33 E. 4. 64.  
 Visne, f. 27.  
 6 H. 7. 3. b.  
 11 H. 7. 33. b.  
 9 E. 4. 5. a.  
 3 E. 4. 26.  
 39 H. 6. Tresp. 93.  
 4 E. 3. 30.  
 (Hob. 99. 206.  
 6 Co. 68. b.  
 1 Leon 109.  
 Cro. Car. 17. Cro.  
 Jac. 302, 303. 304.)

[h] If a trespassse be alledged in *D.* and *nul tiel ville* is pleaded, the jury shall come out *de corpore comitatûs*; but if it be alledged in *S.* and *D.* and *nul tiel ville de D.* is pleaded, the jury shall come out *de vicineto de S.* for that is the more certaine. So if a matter be alledged within a mannor, the jury shall come *de vicineto manerii*; but if the mannor be alledged within a towne, it shall come out of the towne, because that is most certaine, for the mannor may extend into divers townes. And all these points were resolved by all the judges of *England* upon conference betweene them in the case of *John Arundel* esquire indited for the death of *William Parker*. [\*]

[\*] 8 Co. 14.  
 Arundel's case.  
 [i] 45 E. 2. f. a.  
 46 E. 3. 6. & 7.  
 Gernon's case.  
 18 E. 3. 58.  
 11 H. 4. 58. b. 57.  
 17 E. 3. 36. b.  
 59 Ass. 10.  
 38 Ass. 30, 36. Ass. 7.  
 (Cro. Jac. 239.)

[i] In a reall action, where the demandant demands land in one county, as heire to his father, and alledges his birth in another county, if it be denyed that he is heire, it shall not be tryed where the birth was alledged, but where the land lyeth, for there the law presumes it shall be best knowne who is heire. But if the defendant make himselfe heire to a woman, for that is the surer and more certaine side, and the mother is certaine, when perhaps the father is incertaine, and therefore there it shall be tryed where the birth is alledged, because they have more certaine consuance then where the land lyeth. And so it is where generally bastardy is alledged, the tryall shall be in like case *mutatis mutandis*. [k] If a man plead the king's letters patents, and the other party plead *non concessit*, it shall not be tryed where the letters patents beare date, for they cannot be denyed, but where the land lyeth.

[k] Mich. 31 & 32  
 Eliz. Rot. 365 in  
 the King's Bench,  
 inter, Edm. &  
 Franklin, ad-  
 judge 3 Mar.  
 Dier 189.  
 18 Eliz. Dier. 353.  
 17 Eliz. Dier 342.  
 (1. Roll. Abr. 604.  
 Plowd. 232.  
 Cro. Jam. 239.  
 9 Co. 47. a.)

Every tryall must come out of the neighbourhood of a castle, mannor, town, or hamlet, or place known out of a castle, mannor, towne or hamlet, as some forrests and the like, as before and by the authorities thereupon quoted appeareth.

Every plea concerning the person of the plaintife, &c. shall be tryed where the writ is brought, as it appeareth before.

When the matter alledged extendeth into a place at the common law, and a place within a franchise, it shall be tryed at the common law.

[l] 8 E. 4. 24.  
 9 H. 6. 46. 47.  
 21 H. 6. 4. 18. Ass. 7.  
 30 E. 3. 16. 17.  
 7 E. 4. 31.  
 27 H. 3. 30.  
 11 H. 4. 68.  
 [m] 15 E. 4. 25. b.  
 9 H. 6. 46.  
 26 E. 3.  
 7 E. 4. 31.  
 39 E. 3. 16. 17.  
 (Cro. Jac. 134.  
 1. Sid. 76.  
 Hob. 54. 66.  
 Noy 144.  
 2. Roll. Abr. 103.)

[l] In an action against two, the one pleads to the writ, the other to the action, the plea to the writ shall be first tryed; for, if that be found, all the whole writ shall abate, and make an end of the businesse.

[m] In a plea personall against divers defendants, the one defendant pleads in barre to parcell, or which extendeth only to him that pleadeth it, and the other pleads a plea which goeth to the whole, the plea that goeth to the whole, (that is) to both defendants, shall be first tryed; and of this opinion was *Littleton* in our bookes, for the tryall of that goeth to the whole; and the other defendant shall have advantage thereof, for in a personall action the discharge of one is the discharge of both. As for example, if one of

of the defendants in trespassse pleade a release to himselfe (which in law extends to both) and the other pleads not guilty (which extends but to himselfe); or if one plead a plea which excuses himself onely, and the other pleads another plea which goeth to the whole, the plea which goeth to the whole, shall be first tryed; for, if that be found, it maketh an end of all, and the other defendant shall take advantage hereof, because the discharge of one is the discharge of both. But in a plea reall it is otherwise; for every tenant may lose his part of the lands. [n] As if a *fraciſe* be brought as heire to his father against two, and one plead a plea which extendeth but to himselfe, and the other pleads a plea which extends to both, as bastardy in the demandant, and it is found for him, yet the other issue shall be tryed, for he shall not take advantage of the plea of the other, because one joyntenant may lose his part by his misplea. [o] But where an issue is joyned for part, and a demurrer for the residue, the court may direct the tryall of the issue, or judge the demurrer first at their pleasure.

[p] If a *venire fac.* be awarded to the coroners where it ought to be to the sherife, or the visne commeth out of a wrong place, yet if [126. a.] it be *per assensum partium*, and so entred of record, it shall stand; for *omnis consensus tollit errorem*. (1) And thus much of these excellent points of learning: and if you desire to know the institution and right use of this triall by twelve men, and of the antiquitie thereof, and more of this matter, read the 234. Section hereafter, which is worthy of your observation.

“*Estatute*,” or statute. This commeth of the *Latine* word *statutum*, which is taken for an act of parliament made by the king, the lords and commons, and is divided into two branches, generall and speciall. This statute here mentioned is a generall statute, and is darkely and obscurely penned.

“*Et s’ils sont a issue.*” [g] Issue, *exitus*, a single, certaine, and materiall point issuing out of the allegations or pleas of the plaintife and defendant, consisting regularly upon an affirmative and negative to be tried by twelve men. And it is twofold; a speciall issue, as here in the case of *Littleton*; or generall, as in trespassse, not guilty, in assise, *nul tort nul disseisin*, &c. And as an issue naturall commeth of two several persons, so an issue legal issueth out of two several allegations of aduers parties.

And to make our bookes more easie to be understood concerning this point, it is good to set downe some necessary rules (among many other) concerning joyning of issues. An issue being taken generally referreth to the count, and not to the writ. As in an account the writ chargeth him generally to be his receiver, the count chargeth him specially to be his receiver by the hands of *T.*: the defendant pleadeth, that he was never his receiver in manner and forme, &c. this shall referre to the count, so as he cannot be charged but by the receipt by the hands of *T.*

[r] A speciall issue must be taken in one certain materiall point, which may be best understood, and best tryed.

[n] 9 H. 6. 46.  
39 E. 3. 10, 17.

[o] 10. Co. 54.  
and the bookes  
there cited.

[p] Mich. 21 &  
22 Eliz. Dier  
357. 5. Co. 36. b.  
Basham’s case.  
59 E. 3. 2. b.  
44 E. 3. 6.  
11 H. 6. 13.  
5. Co. 40. Dier-  
mer’s case.  
(5. Co. 36. b.  
Hob. 5. 1. Sid. 193.  
2. Roll. 635.  
1. Sid. 339.)  
(5. Co. 40. b.  
Cro. Eliz. 604.  
1. Sid. 260.)

Vid. Sect. 234.  
Vid. 25 E. 3.  
ca. 15.  
F. N. B. 77. c.  
26 E. 3. 73.  
[q] Vid. Sect.  
414. 7 H. 6. 43.  
9 E. 4. 36.  
36 H. 6. 15.  
5 E. 4. 26.  
11 H. 4. 79.  
(Mo. 80. 1. Ro.  
Rep. 86.  
1. Leon. 78.  
9. Co. 110.  
Cro. Cha. 164.  
80. Doct. Plac.  
256, 257. Cro.  
Jam. 87. 560.  
Doct. Plac. 187.  
Cro. Jam. 580.  
586. 589. Hob.  
233.)  
7 E. 3. 34.  
(Cro. El. 373.)

[r] 20 E. 3.  
Issue 31.  
22 E. 4. 24.  
8 E. 3. 8.  
9 H. 6. 18.  
38 E. 3. 33.

[v] 21 H. 4. 9. b.  
16 E. 4. 5.  
24 E. 4. 33. 33.  
75. 31 E. 3.  
Issue 17.  
13 E. 3. ib. 27.  
21 E. 3. 49.  
30 E. 3. 2.  
10 E. 3. 32. 22 E. 3. 13.  
40 E. 3. 4. 8 E. 3. 24.

[s] An issue shall not be taken upon a negative pregnant, which implyeth another sufficient matter, but upon that which is single and simple. As *ne dona fas per le fait* imply a gift by parol; therefore the issue must be *ne dona fas modo et formâ*.

18 E. 3. Issue 34. 5 H. 7. 9. 31. Ass. 35. 12 E. 4. 4. 9. 2 H. 4. 23. 38 H. 6. 22.

[t] 12 El. Dy.  
263. 23 H. 6. 19.  
23 H. 6. 23.  
2 H. 3.  
6 H. 7. 5.  
11 H. 4. 79.  
[u] 2 M. 7. 4.  
5 H. 7. 12. 26.  
11 H. 4. 83.  
6 E. 4. 6. b.  
26 H. 8. Dyer 6.  
in Formedon.  
28 H. 8. Dyer 31.  
18 H. 6. 8. 6.  
15 E. 4. 32. 33 H. 6. 23. 7 H. 6. 27. 43. Ass. 4. 9 E. 4. 36. Pl. Com. 172. a. 36 H. 6. 15. (6 Co. 24.)

[t] An issue joyned upon an *absque hoc, &c.* ought to have an affirmative after it. Two affirmatives shall not make an issue, unlesse it be lest the issue should not be tried.

[u] Some issues be good upon matter affirmative and negative, albeit the affirmative and negative be not in precise words. As in debt for rent upon a lease for yeares, the defendant pleades, that the plaintife had nothing at the time of the lease made; the plaintife replyeth that he was seised in fee, &c. this is a good issue.

[w] 26 H. 8. 3.  
16. El. Dy. 353.  
(1. Sid. 215.  
300. 340. 341.  
Cro. Cha. 164.)  
[x] 22 H. 6. 67.  
59. 33 H. 6. 21.  
3 H. 7. 9.  
12 E. 4. 13.  
17 E. 3. 53. 77. 73.  
23 E. 3. 16. 17.  
24 E. 3. 60.  
40 E. 3. 19.

[w] Where the issue is joyned of the part of the defendant, the entry is, *et de hoc ponit se super patriam*; but if it be of the part of the plaintife, the entry is, *et hoc petit quod inquiratur per patriam*.

[x] There be some negative pleas that be issues of themselves, whereunto the demandant, or plaintife, cannot reply, no more than to a generall issue, which is, *et predictus A. similiter*. As if the tenant do vouch, and the demandant counterplead that the vouchee or any of his auncestors had any thing, &c. whereof he might make a feoffment, he shall conclude, *et hoc petit quod inquiratur per patriam, et predictus tenens similiter*. So in a fine pleaded by the tenant, &c. the demandant may say, *quod partes finis nihil habuerunt, et hoc petit quod inquiratur per patriam, et prad' tenens similiter*. And so in a writ of dower the tenant pleads *unques seisie que dower*, he shall conclude, *et de hoc ponit se super patriam, et prad' petens similiter*; and so in many other cases; and of this opinion was Littleton in our bookes. [y] A man leaves his wife enseint with a child, issue shall not be taken that she was not enseint by her husband on the day of his death, for *filatio non potest probari*; but the issue must be, whether she was enseint the day of his death. (2)

[y] 41 E. 3. 11. b.

[z] A protestation availeth not the partie that taketh it, if the issue be found against him; and therefore if the issue be found for the villeine, he is enfranchised for ever. And yet in some special case, albeit the issue be found against him that maketh the protestation, yet he shall take benefit of his protestation. [\*] As if a man entreth into warrantie, and taketh by protestation the value of the land, albeit the plea be found against him, yet the protestation shall serve him for the value.

[z] 10 E. 4.  
Froust. 5.  
10 E. 4. 12.  
32. Ass. 9.  
30 E. 3. 14.  
9 H. 6. 59.  
Vid. Sect. 192.  
(Plowd. 276.  
Cro. Cha. 365.  
Doct. Plac. 295.)  
[\*] 30 E. 3. 14.

## Sect. 194.

**I**TEM, le seignior ne poet mayhemer son villeine; car s'il maihemer son villein, il serra de ceo indite a le suit le roy, et s'il soit de ceo attaint,

**A**LSO, the lord may not mayme his villeine; for if he mayme his villeine, he shall of that be indicted at the king's suit, and if he be of

*attaint, il ferra pur ceo un grievous fine et ransome al roy. Mes il semble, que villeine n'avera pas per le ley un appeale de mayhem envers son seignior; car en appeale de mayheme home recovera forsque damages; et si le villeine en ceo cas recovera damages envers son seignior et ent avoit execution; le seignior poit prendre ceo que le villeine avoit en execution de le villeine, et issint le recoverie voide, &c.*

of that attainted, he shall for that make grievous fine and ransome to the king. But it seemeth, that the villeine shall not have by the law any appeale of mayhem against his lord; for in appeale of mayhem a man shall recover but his damages; and if the villeine in that case recover damages against his lord, and hath thereof execution; the lord may take that the villeine hath in execution from the villeine, and so the recovery is void, &c.

[126. b.] "**MAYHEMER**," [a] or *mehaigner*, a French word, of which commeth *mayhem*, *mahemium*, (*id est*) *membri mutilatio*, and *membrum est pars corporis habens destinatum operationem in corpore*. *Mayhemium verò dici poterit, ubi aliquis in aliquâ parte sui corporis effectus sit inutilis ad fugnandum*. And the law hath so appropriated this word *mayhem*, which our author here useth, to this offence, as *mayhemavit* cannot be expressed by any other word, as *mutilavit*, *truncavit*, or *detruncavit*, or the like.

"*Il serra indite*," or rather *endite*, and so is the original; for it commeth of the French word *enditer*, and signifieth in law an accusation found by an enquest of 12 or more upon their oath; and the accusation is called *indictamentum*. And as the appeale is ever the suit of the partie, so the inditement is alwaies the suite of the king and as it were his declaration. [b] Some derive it from the Greeke word *enditeo* to accuse.

[c] "*N'avera, &c. appeale de mayhem*." Because in that appeale he shall recover but damages, which the lord after execution might take againe, and so the judgement be *inutile* and illusory, and *sapiens incipit à fine*. And the law never giveth an action, where the end of it can bring no profit or benefit to the plaintife. But here it is to be observed, that, albeit the party grieved can have no action for the mayhem, yet at the king's suite he shall be punished therefore, for the reason hereafter expressed in this Section. [d] And in ancient time there were appeales *de flagis et de imprisonment*; but they are out of use, and turned to actions of trespass.

"*Fine*," *finis*. Here fine signifieth a pecuniarie punishment for an offence, or a contempt committed against the king, and regularly to it imprisonment appertaineth. And it is called *finis*, because it is an end for that offence. [e] And in this case a man is said *facere finem de transgressionem, &c. cum rege*, to make an end or fine with the king for such a transgression. It is also taken for a summe given by the tenant to the lord for concord, and an end to be made. [f] It is also taken for the highest and best assurance of lands, &c.

Here it is good to see, what a fine differeth from an amerciamment. [g] Amerciamment in *Latine* is called *misericordia*, for that it ought to be assessed mercifully. And this ought to be moderated by affeurement of his equals, or else a writ *de moderatâ misericordiâ* doth lie. And thereof

[a] Stanf. lib. 1. ca. 41. Glanvil. lib. 14. ca. 7. Bract. lib. 3. fol. 144, 145. Brit. cap. 35. fol. 48, 49. Flet. lib. 1. ca. 38. (Part. 238. 1 Sid. 216.) Mirror, cap. 1. sect. 9. Vide Sect. 1. (4 Co. 39. b.)

[b] Lamb. Just. of Peace.

[c] Vide 1 H. 4. 6. b. (4 Co. 43.)

[d] Fleta, lib. 1. cap. 40. Brit. cap. 35. Bract. 145. Mirr. cap. 3.

[e] Regist. Judic. 35. 3 Co. 59. Bereher's case. (3 Co. 38.) [f] Vide Sect. 74. 174. 441. (11 Co. 42.)

[g] 3 Co. 59. Bereher's case. F. N. B. 76. (1 Ro. Abr. 338.)

[A] Glanvil lib.  
9 cap. 11.  
Magna Charta  
cap. 14.  
Flet. lib. 2. c. 43.  
§ 60. & lib. 1. cap.  
43.  
Bract. lib. 3. fol.  
170.  
[i] 20 E. 3.  
1 & 2. 14 E. 3.  
Amerciament. 16.  
8 R. 2. libid.  
26, &c.

thereof Glanville saith thus. [A] *Est autem misericordia domini regis, quod quis per juramentum legalium hominum de vicineto cate-nus amerciandus est, ne aliquid de suo honorabili contememento amittat.*

[s] The cause of an amerciament in plea reall, personall, or mixt (where the king is to have no fine) is, for that the tenant or defend-  
dant ought to render the demand (as he is commanded by the king's writ) the first day; which if he do, he shall not be amerced. So as for the delay that the tenant or defendant doth use, he shall be amerced. [k] And albeit the amerciament cannot be imposed, nor the king fully intitled thereunto, untill judgement be given, because by the judgement the wrong is discerned; yet a pardon before judgement, after judgement given, shall discharge the party, because the originall cause, viz. the delay, &c. is pardoned. [f] What then if a *præcipe* be brought against an infant, and, hanging the plea, he cometh of full age? He shall be amerced for the delay [127. a.] after his full age. So likewise if the demandant or plaintife be nonsuit, or judgement given against him, hee shall be likewise amerced *pro falso clamore*.

[h] Pl. Com.  
404 Cole's case.  
27 H. 6. 81.  
5 Co. 49. Vang-  
han's case.

[f] Vaughan's  
case ubi supra.  
Beecher's case  
ubi supra.  
(1 Roll. Rep. 11.)  
(5 Co. 49. a.)  
Cro. Cha. 416.  
8 Co. 62. b.)

[m] F. N. B. 31.  
f. 67. a. & 101. a.  
Bract. lib. 4. fol.  
264. 17 E. 3. 75.  
18 E. 3. 2. Br.  
66. Amere. 43.  
43 Ass. 45. &c.

[m] And for the payment of this amerciament the demandant or plaintife, &c. shall finde pledges; and those demandants or plaintifes that shall find no pledges, (as the king, the queene, an infant, &c.) shall not be amerced. And therefore when such are demandant or plaintife, the writ shall not say, *Si rex, &c. fecerit te securum de clamore suo prosequendo*.

[n] Beecher's  
case. 8 Co. 60. b.  
(1 Re. Abr. 263.)

[n] If a writ doe abate by the act of the demandant or plaintife, or for matter of forme, the demandant or plaintife shall be amerced; but if it abate by the act of God, as by the death of one, where there is two or the like, there shall be no amerciament. And to an amerciament imprisonment belongeth not, as it doth to a fine or ransom. If you desire to read more of fines and amerciaments, vide 8. Co. 38, 39, &c. *Grealye's case*; and 11. Co. 43, 44. *God-freye's case*. (1).

[o] Fleta, lib. 1.  
cap. 47. stat. de  
exposit. verborum.

[o] It is to be knowne that *wite, wisa*, is an old Saxon word, and signifieth an amerciament; as *fledwite*, an amerciament for fleeing or being a fugitive; and so is *flemiswite*, *blodwite* an amerciament for drawing of blood, *ferdwite* concerning warfare; and so *lether-wite*, *thildwite*, *wardwite*, and the like. Sometimes it signifieth forfeiture, sometimes freedom, or acquittall.

[p] Lamb. . . . .  
Pira-  
tion of Saxon  
words.

[p] And *bote* is also an ancient Saxon word, and sometimes signifieth amerciament, or compensation, as *thefbote*, *manbote*; or freedom from the same, as *brigbote*, *castlebote*, *burghbote*.

L. g. s. Inn, cap.  
19.

[q] Lamb. ubi  
supra, and Fleta,  
lib. 1. cap. 47.

*Wera* or *wer*: [q] sometimes signifieth amerciament or compensation, but properly *Wera Anglice idem est in Saxonis lingua, vel pretium vite hominis aspretiatum*; which and the like words you shall often reade in ancient charters.

[r] Dier, 6 Eliz.  
233.

"*Ransome*," [r] *Redemptio*, is here taken for a grand summe of money for redeeming of a great delinquent from some heynous crime,

crime, who is to be captivate in prison untill he payeth it. Some hold it to amount to his whole estate, and others hold that ransom is a treble fine. [s] But in legall understanding a fine and ransom are all one; for, upon the statute of *Merlebridge*, cap. 3. upon these words, *Non ideo puniatur dominus per redemptionem*, [t] the tenant shall not have (where the law distraineth within his fee where nothing is behind) an action of trespass *quare vi et armis* against his lord; for therein the lord should be punished by redemption, that is, by fine, and in that action the fine is very small. And this is manifest by many authorities in all succession of ages; and this appeareth by our author in this place; for he saith, *Il ferra pur ceo un grievous fine et ransome*; where fine and ransom must of necessitie, in his opinion, be taken for all one; for if the fine and ransom were divers, then should the party that mayhemed the villeine, pay two summes, one for a fine, and another for a ransom, which never was done. And aptly a redemption and a fine is taken to be all one; for, by the payment of the fine, he redeemeth himself from imprisonment, that attendeth the fine, and then there is an end of the businesse.

It signifieth properly a summe of money paid for the redemption of a captive, and is compounded of *re* and *emo*, that is, to redeeme or buy again. And it is to be knowne, that [u] by the ancient law of *England*, if the defendant in an appeale of mayhem had been found guilty, the judgement against the defendant had beene, that he should lose the like member that the plaintife lost by his means; as if the plaintife had lost an hand, the defendant also should lose one, *et sic de ceteris*; in respect whereof the writ said, [w] *felonicè mahemavit*, for that the defendant should lose a member.

Alwaies at the common law, when the defendant should lose life or member, the writ said *felonicè, &c.* And now albeit the law be changed (for at this day the plaintife shall, as our author saith, recover but damages) yet the writ of appeale saith still *felonicè*.

Note, the life and members of every subject are under the safeguard and protection of the king; for, as *Bracton* [x] saith, *Vita et membra sunt in potestate regia*. And therewith agreeth a notable record, *Pasch. 19 E. 1. coram rege*, Rot. 36. *North.* *Vita et membra sunt in manu regis*, to the end that they may serve the king and their countrie, when occasion shall be offered. Nay, the lord of the villeine, for the cause aforesaid, cannot mayheme the villeine, but the king shal punish him for mayheming of his subject (for that hereby he hath disabled him to do the king service) by fine, ransom, and imprisonment, untill the fine and ransom be paid. So as there is a manifest diversity betweene a ransom and an amerciament; for ransom is ever when the law inflicteth a corporal punishment by imprisonment (and so is also a fine); but otherwise it is of an amerciament, as hath bin said. And [y] ancients have said, that *ransome n'est forsque redemption de paine corporel per fine des deniers*. This offence of mayhem is under all felonies deserving death, and above all other inferior offences; so as it may be truly said of it that it is, *Inter crimina majora minimum, et inter minora maximum* (2). And in my circuit in anno 1 *Jacobi regis*, in the county of *Leicester*,

one

[s] See the Second Part of the Institutes, Merlebr. cap. 3. 2. Inst. 106. Flowd. 65. b. 7. H. R. 90. c. 4. Co. 11. b. Post 281. b. [t] 5 H. 7. 20. 48 E. 3. 5. 6. 41 E. 3. 25. 44 E. 3. 13. 3 H. 4. 4. 11 H. 4. 78. 1 H. 6. 3. 9 H. 7. 14. 3 E. 4. 16. 10 E. 4. 7. 30 E. 4. 3. 31 E. 4. 3. Mich. 17 & 18 Eliz. Bevel's case, 4. Co. 11. & 9. Co. 76. Comb's case.

[u] 40. Ass. 9. Mirror, cap. 4. & ca. 5. sect. 18. Brit. cap. 28. fol. 48. Bract. lib. 3. fol. 144, 146. Fleta, lib. 1. cap. 38. [w] Bract. ubi supra. Brit. cap. 3. fol. 77. b. 4. Co. 48. Post. 288. a.)

[x] Bract. lib. 1. fol. 6. Pasch. 19 E. 1. coram Rege, Rot. 36. North.

[y] Mirror, cap. 8. sect. 1. & 3.

one *Wright*, a young strong and lustie rogue, to make himselfe impotent, thereby to have the more colour to begge [127. b.] or to be relieved without putting himselfe to any labour, caused his companion to strike off his left hand; and both of them were indicted, fined and ransomed therefore, and that by the opinion of the rest of the justices for the cause aforesaid.

"*Voyde, &c.*" Here by (*&c.*) is implied a maxime in law, *Quodd inutilis labor et sine fructu non est effectus legis*. And againe, *Non licet, quod dispendio licet*. And, *Sapiens incipit à fine*; and, *Lex non præcipit inutilia*. [z] Therefore the law forbiddeth such recoveries, whose ends are vaine, chargeable, and unprofitable.

[z] Vide Sect.  
575 and 576.

## Sect. 195.

**I**TEM, si un vilain soit demandant en action real, ou plaintife en action personal envers son seignior, si le seignior voile pleder en disabilitie de son person, il ne poit faire pleine defence; mes il defendra forsque tort et force, et demandera judgment, s'il serra respondus, et monstra son matter maintenant, comment il est son vilain, et demandera judgment s'il serra respondue.

**A**LSO, if a villeine be demandant in an action real, or plaintiffe in an action personall against his lord, if the lord will plead in disabilitie of his person, he may not make plaine (1) defence; but he shall defend from the wrong and the force, and demand the judgement, if he shall be answered, and shew his matter by and by, how he is villeine. and demand judgement if he shall be answered.

"**D**EMAUNDANT," *Petens*, is hee which is actor in a reall action, because hee demandeth lands, &c. and *plaintife*, *querens*, in actions personals and mixt, *quia queritur de injuriâ, &c.* *Tenant, tenens*, in reall actions; and *defendant, defendens*, in actions personall and mixt.

"*Defence*" (2) commeth of the word *defendo*, so called of the manner of the pleading, viz. *predict. A. B. defendit vim et injuriam, &c.*

For example, in a personall action brought by *A. B.* against *C. D.* the defence is, *Et predictus C. D. defendit vim et injuriam quando, &c. et damna, et quicquid quod ipse defendere debet, &c.*

In this defence there be three parts to be considered. First, when he defendeth the wrong and the force, this hath a double effect, viz. to make himselfe partie to the master; and this is the reason, that the defendant in this and the like actions can plead no plea at all, before he makes himselfe partie by this part of the defence; as it appeareth here by *Littleton*, that [a] if the defendant will plead in disabilitie of the person of the plaintiffe, he must first make himselfe partie by this first part of the defence. Neither can he plead to the jurisdiction of the court, without this part of the defence (3). Secondly [b], by the defence of the damages, he affirmeth that the plaintiffe is able

to

(1) It should be *full*.

(2) [See Note 196.]

(3) Held *contra* by three judges against Holt chief justice. Carth. 220.

[2] 40 E. 3. 36.  
14 H. 4. 15.  
39 E. 6. 12.  
1 E. 4. 15.  
[3] 20 E. 3. 23.  
8 H. 6. 3.



to sue, and (upon just cause) to recover damages. (4) Thirdly, and by the last part, viz. and all that which he ought to defend, when and where he ought, he affirmeth the jurisdiction of the court. *Et sic de similibus*. And of such necessitie it is for the tenant or defendant to make a lawfull defence, as [c] albeit he appeareth and pleads a sufficient barre without making defence, yet judgment shall be given against him.

[d] If villenage be pleaded by the lord in an action reall, mixt or personal, and it is found that he is no villaine, the bringing of a writ of error is no enfranchisement; because thereby he is to defeate the former judgement; and, if in the mean time, the plaintiffe or demandant bring an action against the lord, he need make no protestation, so long as the record remaines in force, for at that time he is free, but the lord shall be restored to all by a writ of error.

[c] 86 H. 6.  
Judgement 58.

[d] 18 E. 4. 6. & 7.

## Sect. 196.

**I**TEM, 6 maners de homes y sont  
(5) queux, s'ils suont action,  
judgement poit estre demand, s'ils ser-  
ront respondus, &c. Un est, lou vil-  
leine suist action envers son seignior,  
come en le cas avantdit.

**A**LSO, there are sixe manner of  
men, who, if they sue, judge-  
ment may be demanded, if they shall  
be answered, &c. One is, where a  
villeine sueth an action against his  
lord, as in the case aforesaid.

[128.a.] "**U**N est lou villeine suist action, &c." Littleton  
here rehearseth six kinds of disabilities of the  
person, disabling him to sue any action reall, personall, or  
mixt.

[c] Bract. lib. 5.  
fol. 481.  
Britton, cap. 49.  
fol. 126.  
Mirror, cap. 2. sect.  
18. 13 H. 4.  
Surety 12. A Gar-  
dian shall disable.  
(Post. 352. b.)

"*S'ils seront respondus*." This is the legall conclusion of the  
plea, when the plea is in disability of the person. And of the verbe  
*respondere* came *responsalis*, often used in the ancient authors of  
the law. [f] *Responsalis* was he, that was appointed by the tenant  
or defendant, in case of extremity and necessitie, to alleage the cause  
of the parties absence, and to certifie the court upon what tryall he  
will put himselfe, viz. the combate or the country. So as his power  
was more than the essoignor, which casteth an essoigne only to excuse  
the absence of the party, as an estranger, which casteth a protec-  
tion, doth. For by the common law, the plaintiffe or defendant, de-  
mandant or tenant, could not appeare by attornie without the king's  
special warrant by writ or letters patents, but ought to follow his  
suite in his owne proper person (by reason whereof there were but  
few suits.) [g] *Abusio est a retiner attorney sans breve de la chan-  
cerie*. And therefore Bracton saith truly, [h] *Attornatus hac omnia  
facere potest* (that is, plead all manner of pleas). *Est igitur magna  
differentia inter attorna'um et responsalem*. So as the statutes that  
give the making of attorneyes, have worne out *responsales*. Now what  
manner of men attorneyes ought to be, or rather what they ought  
not to be, heare what antiquity hath said: [i] *Attorneyes poient  
estre*

[f] Bract. lib. 4.  
fol. 312. b. & lib. 5.  
fol. 349.  
Fleta, li. 6. c. 11.  
Glanvil. lib. 11.  
cap. 1.  
Brit. ca. 126.  
Vid. W. 1. c. 43.  
F. N. B. 25. C.  
Regist. 9.  
(F. N. B. 156. e.)

[g] Mirr. ca. 2.  
sect. 1.  
[h] Bracton,  
ubi supra.  
(8. Co. 89.  
7. Co. 74.)

[i] Mirror, ca. 2.  
sect. 21.

(4) Adjudged acc. on Demurrer, Carth.  
229.

(5) In L. and M. Roh. P. and Red. the  
reading is *contre queux*.

*estre tous ceux, aux queux ley voile suffer. Nemo ne soient estre attornees, ne enfans, ne serfs, ne nul que est en garde ou autrement faut de foy, ne nul crimineux, ne nul cessoigne, ne nul que n'est a le foy le roy, ne nul que ne poet este counte, &c.*

## Sect. 197.

**L**E 2. est, lou un home est utlage sur action de det ou trespas, ou sur auter action ou indictment, le tenant, ou defendant, poit monstrier tout le matter de record, et l'utlagarie, et demaunder judgement, s'il serra respondue; pur ceo que il est hors de la ley de suer aucun action durant le temps que il soit utlage.

**T**HE second is, where a man is outlawed upon an action of debt or trespasse, or upon any other action or indictment, the tenant, or the defendant, may shew all the matter of record, and the outlawry, and demand judgement, if he shall be answered; because he is out of the law to sue an action during the time that he is outlawed.

[a] Broton, lib. 5. fol. 431.  
Britton, ca. 12.  
fol. 39. Mirr. ca. 3.  
de exceptione a  
procur. ca. 4. de  
hinc puniabile.  
[f] 21 E. 4. ca. b.  
24 E. 4. 30. b.  
24 E. 4. 12.  
[m] 13 E. 4. lib. 12.  
[n] 7 H. 4. ca.

[o] 23 H. 2. c. 3.  
2 H. 7.  
(1. Sid. 43. Cro.  
Jam. 425. 616.)  
[p] Mirr. ca. 3.  
sec. 13 E. 4. 16.  
33 H. 6. ca. 2.  
[q] Bract. lib. 3.  
fo. 125.  
3 H. 5.  
Utlagary 11.  
38 E. 3. 5.  
[r] Britton, fo. 39.

[s] 20 E. 2.  
Coron. 223.  
19. Ass. p. 10.  
3 H. 6. 15. b.  
5 H. 6. 23.  
5 H. 7. 5 Eliz.  
Dyer 223.  
F. N. B. 244.  
Statut. Pl. Coron.  
106. (Nov. 74. 143.)  
(6. Co. 143. b.)  
[t] 28. Am. 60.  
13 E. 3. Utlagaria,  
3. M. 4 & 5. M.  
Dyer 223.  
38 E. 3. 15.  
(Post. 223. b,  
6. Co. 111.)

**L**E 2. est [k] lou un home est utlage, &c." But these general words receive a distinction, viz. [l] if an executor or an administrator sueth any action, utlary in the plaintife shall not disable him: because the suit is *in auter droit*, that is in the right of the testator, and not in his owne right. And for the same reason, [m] a maior and communalty shall have an action, though the maior be outlawed. [n] In a writ of error to reverse an utlary, utlary in that suit, or at any stranger's suit, shall not disable the plaintife, because if he in that action should be disabled, if he were outlawed at several men's suits, he should never reverse any of them. [o] In an attain outlary in the plaintife cannot be pleaded in disability of the person (1). [p] Outlary in *Chester* or *Durham* shall not disable the plaintife in any court at *Westminster*, &c. [q] *Minor verò, et qui infra etatem 12 annorum fuerit, utlagari non possit, nec extra legem poni; quia ante talem etatem non est sub lege aliquà nec in decernà.* [r] He that is abjured the realme may be disabled, for that he is *extra legem*, and yet he is not properly outlawed.

"*Monstrier tout le matter de record.*" Here note two things: first, by this word (*monstrier*), that [s] when any man pleads an utlary in disability of the person, hee must shew forth the record of the outlawrie *maintenant sub fide sigilli*, (be- [128. b.] cause the plea is but dilatorie) unless the record be in the same court. But if he plead an outlawrie in barre, if it be denyed, he shall have a day to bring it in.

Secondly [t], before the defendant can disable the plaintife, the outlawrie must appeare of record; and the judgement after the *quinto exactus* given by the coroners in the county court is not sufficient,

(1) Rot. Parl. 20 H. 6. n. 18. c. 2. Hal. MSS.

cient, until the writ of *exigent* be returned, and the outlawrie appeare of record: which is manifest by *Littleton's* owne words, (viz.) *matter de record*; whereof see more hereafter, Sect. 503.

It is to be observed, that there be two kinds of appearances before the *quinto exactus*, to avoid the outlawry, viz. an appearance in deed, that is, to render himselfe, &c. and the other is by an appearance in law, [u] that is, by purchasing a *supersedas* out of the court where the record is, which is an appearance of record: and therefore, though it be not delivered to the sherife before the *quinto exactus*, yet it shall avoid the outlawrie; and so are the bookes, that speake hereof, to be intended.

[w] If a man be outlawed at the suit of one man, all men shall take advantage of this personall disability. And so it is in case of *alien née*, and of *excommungement*. But otherwise it is in case of villénage, for that disability is onely given to the lord.

“*Durans le temps que il est utlage.*” [x] If the defendant plead an outlawrie in the plaintife, in disability of his person, and the plaintife after that plea pleaded purchase a charter of pardon; because the charter hath restored him to the law, the defendant shall answer. So note, the disability abateth not the writ, but disinableth the plaintife, untill he obtaineth a charter of pardon; and so it appeareth here by *Littleton*.

“*Judgement s'il serra respondue.*” [y] If the ground or cause of the action bee forfeited by the outlawry, then may the outlawry bee pleaded in barre of the action; as in an action of debt, detinue, &c. But in reall actions, or in personall, where dammages be incertaine, (as in trespassse of batterie, of goods, of breaking his close, and the like) and are not forfeited by the outlawrie, there outlawry must be pleaded in disability of the person.

[z] And it is to be observed, that, in the reign of king *Ælfred*, and untill a good while after the Conquest, no man could have been outlawed but for felonie, the punishment whereof was death. But now the law is changed, as it appeareth by that which hath beene sayd. And hereby you shall understand old bookes and records, which say, that an outlawed man had *caput lupinum*, because he might be put to death by any man, as a wolfe that hateful beast might. [\*] *Utlagatus et wotviata capita gerunt lupina, quæ ab omnibus impune poterunt amputari; merito enim sine lege ferire debent, qui secundum legem vivere recusant.* And another saith, [a] *Utlage pur felonie teigne leu pur loup, et est crible woolfeshered, pur ceo que loup est beas haye de tous gentz, et de ceo en avant list al ascun de le occider al foer del loup, dont custome soloit estre de porter les testes al chiefe lieu del county, ou de la franchise, et soloit la avoir demy mark del countie pur chescun teste de utlage et de loup.* And this agreeth with the law before the Conquest. [b] *Utlagatus lupinum gerit caput, quod Anglice wolfehead dicitur: et hæc est lex communis et generalis de omnibus utlagatis.* [c] But, in the beginning of the raigne of king *Edward* the third, it was resolved by the judges, for avoyding of inhumanity, and of effusion of Christian blood,

[u] Tr. 44. El. in Com. Banco inter Merc & Dolburie. 33 H. 6. 1. 11 H. 4. 34. Dyer 3. El. 192. 5. El. 233. 4 H. 4. le 1. case. 8 H. 4. f. 7. 37 H. 6. 17. 33 E. 3. Err. 77. 21 H. 6. 30. (Mo. 73.) [w] 33 H. 6. 19. b. &c.

[x] 44 E. 3. 27. (Doct. Plac. 108. 304.)

[y] 9 El. Dyer 262. 7 H. 4. 4. b. Stanf. Pl. Coron. 188. 6. Co. 109. in Foxley's case. 28 E. 3. 92. 29. Am. p. 47. 63. 30 H. 6. 5. (Doct. Plac. 398.)

[z] Mix. c. 1. sect. 3. &c. 3. &c. 4. supp. cap. 6. sect. 1.

[\*] Fleta, lib. 1. ca. 27. Bract. li. 6. f. 431. Brit. l. 20. b. [a] Mix. ca. 4. sect. 4. defaultis puniabilis.

[b] Lamb. fol. 228. [c] 2. Ass. P. 2. 2 E. 3. tit. Coron. 148.

[\*] Bracton, lib.  
2. fo. 431.  
3 H. 6. 9. b.  
40 E. 3. 2.  
35 H. 6. 6.  
40 E. 3. 2.

blood, that it should not be lawfull for any man, but the sherife onely, (having lawfull warrant therefore) to put to death any man outlawed, though it were for felonie; and if he did, he should undergoe such punishments and paines of death as if he had killed any other man; and so from thenceforth the law continued untill this day. (*Nota, wolfshead and wulferfod is all one.*) [\*] And after in Bracton's time, and somewhat before, processe of outlawry was ordained to lie in all actions that were *quare vi et armis*, which Bracton calleth *delicta*; for there the king shall have a fine (1). But since, by divers statutes, processe of outlawry doth lie in account, debt, detinue, annuity, covenant, *action sur le statute de 5 Rich. 2. action sur le case*, and in divers other common or civil actions. But now let us heare what Littleton will say unto us.

## Sect. 198.

**L**E 3. est. un alien, que est née hors de la ligeance nostre seignior le roy, si tiel alien voile suer un action reall ou personall, le tenant ou defendant poit dire, que il fuit née en tiel pais, que est hors de la ligeance le roy, et demander judgement si il serra respondue.

**T**HE third is an alien, which is born out of the ligeance (2) of our soveraigne lord the king, if such alien will sue an action reall or personall, the tenant or defendant may say, that he was borne in such a country, which is out of the king's allegiance, and aske judgement if he shall be answered.

[a] Bract. lib. 2.  
fol. 415. 437.  
Mir. c. 1. sect. 3.  
c. 5. sect. 1. &  
ca. 3. except a  
provera.  
Flet. li. 2. c. 47.  
Brit. fo. 20.  
13 E. 3. Br.  
677. 25 E. 3.  
de Natis ultra  
mare. 31 E. 3.  
Cosinage 2.  
43 E. 3. 2.  
9 E. 4. 7.  
11 H. 4. 26.  
14 H. 4. 10, 20.  
5 H. 6. 35.  
23 H. 6. 35.  
Stauf. Pl. Cor. 197.  
a. 7. Co. 1.  
Calvin's case.  
Pl. Com. 358.  
per Sanders.  
Vid. 5. ct. 1. 439,  
440, 441.  
[b] 9 E. 4. 2. c.  
Pl. Com. 130. b.

[c] Rot. Pari.  
23 E. 1. Ehas  
de Daubene.

**"ALIEN,"** [a] *Alienigena*, is derived from the *Latine* word *alienus*, and according to the etymologie of the word it signifeth one borne in a strange country, under the obedience of a strange prince or country, (and therefore Bracton saith, that this exception, *propter defectum natiuitatis*, should rather be *propter defectum subjectionis*) or as Littleton saith, (which is the surest) out of the ligeance of the king. Note, here Littleton saith not *hors del realme*, but *hors de ligeance*: for he may be borne out of the realme of *England*, yet with in the ligeance. And he that is borne within the king's ligeance is called sometime a *denizen*, *quasi deins née*, borne within, and thereupon in *Latine* called *indigena*, the king's liegeman; for *ligeus* is ever taken for a naturall borne subject.

But many times in acts of parliament, *denizen* is taken for an alien borne, that is enfranchised or denized by letters patent, whereby the king doth grant unto him, [b] *quod ille in omnibus tractetur, reputetur, habeatur, teneatur, et gubernetur, tanquam ligeus noster, infra dictum regnum nostrum Angliæ oriundas, et non aliter, nec alio modo.* But the king may make a particular denization: [c] as he may grant to an alien, *quod in quibusdam curiis suis Angliæ audiat ut Anglus, et quod non repellatur per illam exceptionem, quod sit alienigena et natus in partibus transmarinis*, to enable him to sue onely. The severall senses of which word must be gathered *ex antecedentibus, adjunctis, et consequentibus*; and they that take him in that sense, derive the word from *donaison*, (i. e.) *donatio*, because his freedome is given unto him by the king.

There

(1) [See Note 197.]

(2) [See Note 198.]

There is another kind, and that is an alien naturalized, and that must be by act of parliament. And this alien naturalized to all intents and purposes is as a naturall borne subject (1), and differeth much from denization by letters patent; for if he had issue in *England* before his denization, that issue is not inheritable to his father; but if his father be naturalized by parliament, such issue shall inherit. So if an issue of an *Englishman* be borne beyond sea, if the issue be naturalized by act of parliament (2), he shall inherit his father's lands; but if he be made denizen by letters patent, he shall not; and many other differences there be betweene them.

(Cro. Cha. 601.)

"*Ligeance*," à *ligando*, being the highest and greatest obligation of dutie and obedience that can be. Ligeance is the true and faithful obedience of a liegeman or subject to his liege lord, or soveraigne. *Ligeantia est vinculum fidei: ligeantia est legis essentia.*

Vide Calvin's case ubi supra.

|   |                       |   |   |
|---|-----------------------|---|---|
| <i>Ligeantia domini regi debita est duplex.</i> | <i>Perpetua,</i>      | 1. <i>Originaria, sive naturalis, sive nata</i> [d]; and this is alwayes absolute and incident inseparable. <i>Nemo patriam, in qua natus est, exuere, nec ligeantia debitum ejurare possit.</i>  | [d] 13. El. Diet. in. 300. b. Doctor Storke's case,   |
|   |                       | 2. <i>Data, aut per denizationem, aut per naturalizationem (ut supradictum est) et ista ligeantia per denizationem potest esse sub conditione.</i>  |   |
|   | <i>Temporanea aut</i> | <i>Localis, quia quilibet alienigena, qui in hoc regno sub protectione regis degit domino regi ligeantiam debet.</i> And if he be indicted of high treason, the indictment shall say, [e] <i>contra ligeantia sua debitum; et ideo dicitur temporanea et localis, quia non durat, nisi quousque infra regnum moratur.</i> | (Hob. 271.)   |
|   |                       | <i>Limitata, as when one is made denizen for life, or in taile, [f] But one cannot be naturalized, either with limitation for life, or in taile, or upon condition: for that is against the absolutenesse, puritie, and indebility of naturall allegiance.</i>  | [e] 3 & 4 P. & M. Di. 144. 7 Co. 6, &c. Calvin's case.<br><br>[f] 9 E. 4. 7. Calvin's case ubi supra. (Cro. Jam. 639, 2 Ro. Rep. 96.) |

[\*] An abbot, prior, or prioress alien, shall have actions reall, personal, or mixt, for any thing concerning the possessions or goods of his monastery here in *England*, though hee bee an alien borne out of the king's ligeance; because he bringeth it not in his owne  
[129. b.] right, but in the right of his monastery, and not in his naturall but in his politique capacity (1).

[\*] 13 E. 3. Br. 504. 20 E. 3. Annuity 24. 17 E. 3. 21. 40 E. 3. 10. 27 Am. 48. 14 H. 4. 7. 22 E. 4. 44. 21 H. 7. 7. Statut. Praer. 54. L'Esint. de Carlisle, 35 E. 1. (Doct. Plac. 8. Dy. 1. b.) [h] Bracton, 426, 427, 430. 8 E. 3. 61. 5 E. 2. Ab. 18.

"*Reall ou personall.*" [h] In this case the law doth distinguish betweene an alien, that is a subject to one that is an enemy to the king, and one that is subject to one that is in league with the king; (2) and true it is that an alien enemy shall maintaine neither reall nor personall action, *donec terrae fuerint communes*, that is untill both nations

nations

(1) [See Note 199.]  
(2) [See Note 200.]

[129. b.]  
(1) [See Note 201.]  
(2) [See Note 202.]

13 E. 2. Bro.  
677. 23 E. 3.  
14. 20. 21 E. 3.  
Coinage 6.  
48 E. 3. 2.  
13 E. 4. 9.  
11 H. 4. 26.  
9 E. 4. 7.  
19 E. 4. 7.  
20 E. 4. 6.  
23 E. 4. 9, 10.  
33 H. 6. 23. 39 H. 8.  
31 H. 6. ca. 4. Livre d'Entrées in Ejec. 7. 6 H. 8. Dier 2. 6 H. 7. 12.

nations be in peace (3); but an alien that is in league, shall maintaine personall actions; for an alien may trade and traffique, buy and sell, and therefore of necessity he must be of ability to have personall actions; but he cannot maintaine either reall or mixt actions. An alien that is condemned in an information, shall have a writ of error to relieve himselfe. *Et sic de similibus*

[2] 20 E. 3.  
Br. Denizen 12.  
Vid. Statm. Pl.  
Ca. 107. a.

[\*] If an alien be made a prior or abbot, the plea of *alien née* shall not disable him to bring any reall or mixt action concerning his house, because he is *in auter droit*, as before is said (4).

"*Hors del ligeance nostre seignior le roy.*" Here *Littleton* doth not say, out of the realme or beyond the sea, (5) (as he doth Sect. 439, 440, 441. 677.) but out of the ligeance; for (as hath beene said before) a man may be borne out of the realme, viz. of *England*, as in *Ireland*, *Jersey*, and *Guernsey*, &c. (6) and yet seeing he is not borne out of the ligeance of the king, as *Littleton* here speaketh, he is no alien. But herof there is so much and so plentifully spoken in our bookes, and especially in the case of *Calvin ubi supra*, as this shall suffice.

"*Et demaunder judgment s'il serra respondue.*" So as the tenant or defendant shall neither plead *alien née* to the writ or to the action, but in disability of the person as in case of villenage and outlawrie before. [i] And *Littleton* is to be intended of an alien in league; for if he be an alien enemy, the defendant may conclude to the action.

[i] Livre d'Entrées, Allen 1.  
(Doct. Plac. 66.  
Dy. 2. b.)

## Sect. 199.

**L**E 4. est un home, que per judgement donc envers lui sur un briefe de *Præmunire facias*, &c. est hors de protection le roy. Si il suist ascun action, et le tenant ou le def. monstrera tout le record envers luy, il poit demaunder judgement s'il serra respondue; car la ley le roy et les briefs le roy sont les choses, per queux home est protect et aide; et issint, durant le temps que home en tiels cas est hors de la protection le roy, il est hors de estre aide ou protect per la ley le roy, ou per briefe le roy.

**T**HE fourth is a man, who by judgement given against him upon a writ of *præmunire facias*, &c. is out of the king's protection. If he sue any action, and the tenant or defendant shew all the record against him, he may aske judgement if he shall be answered; for the law and the king's writs be the things, by which a man is protected and holpen; and so, during the time that a man in such case is out of the king's protection, he is out of helpe and protection by the king's law, or by the king's writ.

"**PRÆMUNIRE.**"

(3) [See Note 203.]

(4) [See Note 204.]

(5) See ante 107. a. n. 6. there, and post. 44. p.

(6) Rot. Parl. 9 H. 6. n. 20. *indemization of one born in Wales*. Simile Rot. Parl. 23 H. 6. n. 26. Co. 2. Inst. 741. on stat. 31 h. 4. Hal. MSS.

“**P****RÆMUNIRE.**” Some hold an opinion, that the writ is called a *præmunire*, because it doth fortifie *jurisdictionem jurium regiorum corone sue* of the kingly lawes of the crowne against foreigne jurisdiction, and against the usurpers upon them, as by divers acts of parliaments appeare. But in truth it is so called of a word in the writ; for the words of the writ be, *præmunire facias prefatum A. B. &c. quòd tunc sit coram nobis, &c.* where *præmunire* is used for *præmonere*, and so doe divers interpreters of the civill and canon law use it; for they are *præmuniti* that are *præmoniti*. By the statutes before quoted in the margent you shall perceive what statutes were made before *Littleton* wrote, and what have beene ordained since to make offences in danger of a *præmunire*.

1 Eliz. ca. 1. 5 Eliz. c. 1. 13 Eliz. ca. 1, 2. 8. 27 Eliz. c. 2. 39 Eliz. ca. 18.

For Precedents, Vide Mich. 29 E. 3. coram rege in Thesaur. Pasch. 44 E. 3. Ibid. Melbourne's case. Mich. 38 H. 6. Ibid. the case of Rich. Beauchamp and others. Hil. 25 H. 8. coram rege, the case of Nic. Bishop of Norwich. Trin. 36 H. 8. Rot. 9. coram rege, the case of the Bishop of Bangor. Mich. 25. & 27 Eliz. coram rege, Ferrot against D. Bevance and others. Booke of Entries, fo. 439. & 430. & ibid. Mich. 9 H. 7. f. 23.

“*Hors del protection le roy.*” The judgement in a *præmunire* is, that the defendant shall be from thenceforth out of the king's protection, and his lands and tenements, goods and chattels forfeited to the king, and that his body shall remaine in prison at the king's pleasure. So odious was this offence of *præmunire*, that a man that was attainted of the same, might have bin slaine by any man, without danger of law; because [k] it was provided by law, that a man might doe to him as to the king's enemy, and any man may lawfully kill an enemy. But queene *Elizabeth* and her parliament [\*], liking not the extreme and inhumane rigor of the law in that point, did provide, that it should not be lawful for any person to slay any person in any manner attainted in or upon any *præmunire*, &c. Tenant in taile is attainted in a *præmunire*, he shall forfeit the land but during his life; for albeit the statute of 16 R. 2. ca. 5. enacteth, that in that case their lands and tenements, goods and chattels, shall be forfeit to the king, that must bee understood of such an estate as he may lawfully forfeite, and that is during his owne life. And these generall words doe not take away the force of the statute *de donis conditionalibus*, but hee shall forfeit all his fee simple lands, states for life, goods and chattels; and so was it resolved in *Trudgin's* case.

“*Car la ley le roy et les briefes le roy, &c.*” There be three things, as here it appeareth, whereby every subject is protected, viz. *rex, lex, et rescripta regia*, the king, the law, and the king's writs. The law is the rule, but it is mute. The king judgeth by his judges, and they are the speaking law, *lex loquens*. The processe and the execution, which is the life of the law, consisteth in the king's writs. So as he that is out of the protection of the king, cannot be aided or protected by the king's law or the king's writ. *Rex tuetur legem, et lex tuetur jus.* [l] Besides men attainted in a *præmunire*, every person that is attainted of high-treason, petit-treason,

(3 Inst. 119.)

For statutes, Vid. 35 E. 1. stat. de Cartisale, 25 E. 3. c. 23. 25 E. 3. Stat. de Provisors. 27 E. 3. c. 1. 38 E. 4. c. 3. 2 H. 3. c. 19. 3 R. 2. c. 3. 13 R. 2. c. 5. 16 R. 2. c. 5. 2 H. 4. c. 3 & 4. 6 H. 4. c. 1. 24 H. 8. c. 12. 25 H. 8. c. 10, 20. 26 H. 8. c. 10.

Book cases. 21 E. 3. 40. B. 18 H. 6. 6. 0 E. 4. 2. 35 E. 3. 7. 24 H. 8. tit. *Præmunire* 10. 10 H. 4. 12. 27 E. 3. 84. 6 H. 7. 14. 44 E. 3. 30. 11 H. 7. tit. *Præmunire*, p. 5. 17 H. 7. Justice Spilman's in Tanberville's case. Kellway, f. 195. Doct. & Stud. Lib. 2. cap. 32. Brooke tit. *Præmunire* 21. Temps E. 6. Bishop Barloe's case. [k] 24 H. 8. Brooke Coron. 196. [l] 5 Eliz. ca. 1. Hil. 21. El. Trudgin's case resolved per les Justices. 7 H. 4. 20. Simon Beverley's case. (Post. 391. 2. Ro. Abr. 177.)

[7] 4 E. 4. 8. 1 E. 4. 1. b. 30 E. 3. 4. 8 Eliz. Diet. 24.

[\*] Mich. 9 E. 3.  
curam rege, Rot.  
84. Warw.

Protection, { Gene-  
                  { rall.  
                  { Partit-  
                  { ular.  
of the Generall,  
vide 7 Co. Calvin's  
case per totum.  
(F. N. B. 28. B.  
1. Leon. 185.  
Mo. 239.  
3 Re. Abr. 32.)

treason, or felony, is disabled to bring any action: for he is [\*] *extralegem positus*, and is accounted in law *civilliter mortuus*.

It is to be understood, that there is a generall protection of the king, whereof *Littleton* here speaketh; and this extends generally to all the king's loyal subjects, denizens and aliens within the realme, whose offences have not made them incapable of it, as before it appeareth. And there is a particular protection by writ, which is one of the king's writs that *Littleton* here speaketh of. This particular protection is of two sorts; one, to give a man immunity or freedom from actions or suits; the second, for the safetie of his person, servants and goods, lands and tenements, whereof he is lawfully possessed, from violence, unlawfull molestation or wrong. The first is of right, and by law; the second are all of grace, (saving one) for the generall protection implyeth as much. Of the first sort some are *cum clausulâ (volumus)*; so called, because the writ hath this word (*volumus*) in it, viz. *volumus quòd interim sit quietus de omnibus placitis et quærelis, &c.* and the other a protection *cum clausulâ (notumus)*; so called for the like reason. Of protections *cum clausulâ (volumus)* for staying of pleas and suites there be foure kindes, viz. 1. *Quia profecturus* (so called by reason they are part of the words of the writ). 2. *Quia moraturus* (so named for distinction for the like cause). 3. *Quia indebitatus nobis existit* of the matter. 4. When any sent into the king's service in warre is imprisoned beyond sea. The former are for staying of actions and suits in generall. The third is for staying of suits of the subject for debts and duties due by the king's debtor to them. Of the fourth you shall reade hereafter in this place. For the former two these nine things are to be observed. 1. For what cause they are to be granted. 2. For what persons they are allowable. 3. A threefold time is to be considered, viz. the time of the purchase of them, the time of the continuance of them, and the time when they shall be cast. 4. In what place the service is to be performed. 5. In what actions these protections are allowable. 6. Under what seale and to whom they are directed. 7. Who is to allow or disallow of them. 8. By whom they are to bee cast, and in what manner. 9. How upon just cause they may be repealed or disallowed. I must but point at these matters, to make the studious reader capable of them, and referre him to the bookes and other authorities at large, being excellent points of learning.

As to the first, it is of two natures: the one concerne services of war, as the king's souldier, &c. the other wisdom and counsell, as the king's ambassador or messenger *pro negotiis regni*. Both these being for the publique good of the realme, private mens actions and suites must be suspended for a convenient time; for *jura publica anteferenda privatis*; and againe, *jura publica ex privatis promiscuè decidi non debent*. [a] And the cause of granting of a protection must be expressed in the protection; to the end it may appeare to the court that it is granted *pro negotiis regni et pro bono publico*, [b] or, as some others say, *pur le common profit del realme*. And *Britton* saith, *notre service, sicome estre en nostre force, et le defence de nous et de nostre people, &c.* [\*] A man in execution *in saluâ custodiâ* shall not be delivered by a protection.

[c] To the second, these protections are not allowable onely for men of full age, but for men within age, and for women (1), as necessary

[a] 39 E. 3. 39.  
3 H. 6. 14.  
Protection 2.  
13 R. 2. ca. 16.  
[b] Mirror, cap.  
3. Sect. 23.  
Britton, fo. 281.  
Fleta, lib. 6.  
cap. 7, 8, &c.  
Bracton.  
[\*] 6. Marie  
Dyer 152.  
(Cro. Cha. 389)

[c] 10 H. 4. 51.  
10 E. 3. 51.  
1. N. B. 28 l.  
11 E. 3. Not.  
Part. 3. part. for  
the Countesse of  
Warwick.



necessary attendants upon the campe, and that in three cases, *quia lotrix, seu nutrix, seu obstetrix*.

[d] Corporations aggregate of many are not capable of these two protections, either *profectura* or *moratura*, because the corporation itselfe is invisible, and resteth onely in consideration of lawe. [e] Protection for the husband shall serve also for the wife.

[f] Albeit the vouchee, tenant by rescit, preier in aide, or garnishee, bee no parties to the writ, yet before they appeare, a protection may be cast for them; because when the demandant grants the voucher or rescit, in judgment of law they are made privie. But if the demandant counterplead the voucher or rescit, then untill it be adjudged for them, and so they privie in law, a protection cannot be cast for them. And so it is of the garnishee, a protection may be cast for him at the day of the returne of the *scire facias*. [g] No protection can be cast for the demandant or plaintife; because the tenant or defendant cannot sue a re-sommons, or a re-attachment, but the plaintife onely, that sued out the summons or attachment, &c. must sue also the re-sommons or re-attachment. And so it is of an actor in nature of a plaintife, &c. as the garnishee after appearance, and an avowant, and the like. [h] An officer of the king's rescit, or any other officer in any court of record, whose attendance is necessary for the king's service or administration of justice, being sued, cannot have a protection cast for him.

[i] In every action or plea reall or mixt against two, where protection doth lie, a protection cast for the one doth put the plea without day for all. So it is in debt, detinue and account. But in trespassse, or any action in nature of trespassse, which is in law severall, where every one may answer without the other, there a protection cast for the one shall serve for him onely, unless they joyne in pleading; or if they plead severall pleas, and one *venire facias* is awarded against all, there a protection cast for one, shall put the plea without day for all; and therefore in former times the plaintife used to sue out severall *venire facias* in those cases for feare of a protection, &c.

116. 4 H. 4. 4. 29 E. 3. 41. 45 E. 3. 24. 22. 11 E. 4. 7. F. N. B. 33. k. (11 Co. 5. b.)

[k] As to the three-fold time, first, a protection *profectura* regularly must not be purchased hanging the plea. But this faileth, when he goeth in the king's service in a voyage royall; and that is two-fold; either touching warre, and that onely is when the king himselfe or his lieutenant, that is *prorex* goeth; or when any goeth in the king's ambassage, *pro negotio regni*, or for the marriage of the king's daughter, or the like, this is also called a voyage royall. But a protection *moratura* may be purchased and cast *pendente placito*.

7 Co. 7. 8. Calvin's case. 13 R. 2. cap. 16. (2. Ro. Abr. 332. Ante 69. b.)

[l] Regularly a protection cannot be cast, but when the party hath a day in court, and when if he made default, it should save his default. Therefore when execution is to be granted against body, lands,

[d] 30 E. 3. 1.  
31 E. 4. 36.  
31 E. 3. 97.  
[e] 35 H. 6. 3.  
43 E. 3. 23.  
48 E. 3. 7.  
4 H. 5. Protection  
107.

[f] 45 E. 3.  
Prot. et. 37.  
3 H. 6. 18. 30.  
8 H. 6. 16.  
9 H. 6. 36.  
40 E. 3. 12.  
32 E. 3.  
Protect. 64.  
31 E. 3.  
14 H. 4. 16.  
45 E. 3. tit.  
Protect. 40.  
14 E. 3.  
Protect. 66.  
(2. Ro. Abr. 334.)  
[g] 24 E. 3. 20.  
47 E. 3. 5.  
8 H. 5. 5.  
38 E. 3. 1.  
F. N. B. 33. g.  
30 R. 2. Protect.  
106.  
22 H. 6. 28.  
9 H. 6. 36.  
43 E. 3. 36.  
17 E. 3. 24.  
25 E. 3. 43.  
24 E. 3. 26.  
13 E. 3. Protect.  
71.  
14 E. 3. ib. 65. 63.  
20 E. 3. ibid. 84.  
[h] 7 H. 4. 3. a.  
[i] 9 E. 3.  
Protect. 80, 81.  
32 E. 3. ib. 55.  
16 E. 2. ib. 77.  
13 E. 3. ib. 70.  
41 E. 3. ib. 95.  
41 E. 3. 32.  
42 E. 3. 9.  
5 H. 5. 7.  
3 H. 4. 16.  
2 R. 2. Protect. 45.  
43 E. 3. ibid. 31.  
2 H. 6. 32.  
21 H. 6. 41.  
38 E. 3. 12.  
7 H. 6. 31.  
33 E. 3. Protect.  
56.  
10 E. 3. 54.  
13 E. 3. Amercia-  
ment 18.

[j] 24 E. 3. 20.  
47 E. 3. 5.  
8 H. 5. 5.  
38 E. 3. 1.  
F. N. B. 33. g.  
30 R. 2. Protect.  
106.  
22 H. 6. 28.  
9 H. 6. 36.  
43 E. 3. 36.  
17 E. 3. 24.  
25 E. 3. 43.  
24 E. 3. 26.  
13 E. 3. Protect.  
71.  
14 E. 3. ib. 65. 63.  
20 E. 3. ibid. 84.  
[h] 7 H. 4. 3. a.  
[i] 9 E. 3.  
Protect. 80, 81.  
32 E. 3. ib. 55.  
16 E. 2. ib. 77.  
13 E. 3. ib. 70.  
41 E. 3. ib. 95.  
41 E. 3. 32.  
42 E. 3. 9.  
5 H. 5. 7.  
3 H. 4. 16.  
2 R. 2. Protect. 45.  
43 E. 3. ibid. 31.  
2 H. 6. 32.  
21 H. 6. 41.  
38 E. 3. 12.  
7 H. 6. 31.  
33 E. 3. Protect.  
56.  
10 E. 3. 54.  
13 E. 3. Amercia-  
ment 18.

[k] 3 H. 6.  
Protect. 2.  
39 H. 6. 39.  
44 E. 3. 12.  
13 R. 2. c. 16.  
3 H. 4. 16.  
11 H. 4. 7.  
7 E. 4. 37.  
28 H. 6. 1.  
17 H. 6. Protect.  
56.  
10 E. 3. 54.  
13 E. 3. Amercia-  
ment 18.

[l] 4 H. 6. 22.  
17 E. 3. 76.  
33 E. 3. tit.  
Protect. 115.  
34 E. 3. ib. 124.

27 E. 3. 79. 1  
29 E. 3. Protect.  
82. 82.  
2 E. 4. 15.  
29 E. 3. Protect.  
82. 79.  
23 E. 3. ib. 72.  
9 E. 3. 21.  
5 H. 6. 58.  
4 H. 6. 22.  
11 H. 6. 14.  
14 H. 6. 22. 21 H. 6. 10. 27 H. 6. 4. 28 H. 6. 1. 35 H. 6. 52. 44 E. 3. 2. 16. 48 E. 3. 2. 7 H. 4. 2. 14 H. 4. 23.  
27 E. 3. 79.

lands, or goods, no protection can be cast; because the defendant hath no day in court. If a protection be cast at the *nisi prius* for one, if before the day in banke it be repealed by *Innotescimus*, yet because it was once well cast, it shall save his default; but if the protection be disallowed, either for variance, or that it lay not in the action, or the like, there it shall turne to a default.

[m] 22 E. 3. 4.  
16 E. 3. Protect.  
47.  
44 E. 3. 16.  
3 E. 3. Amercement 18.  
34 E. 3. Protection 123.  
[n] 39 H. 6. 39.  
F. N. B. f. 28.  
Fleta, lib. 6. ca. 2.  
Tempa E. 1.  
Grand cape 26.  
(Post. 254. b.)

[m] If a man hath a protection, and notwithstanding plead a plea, yet at another day of continuance after that a protection may be cast; so at a day after an exigent; but after appearance he cannot cast a protection in that terme, untill a new continuance be taken.

[n] Thirdly, no protection, either *profectura* or *moratura*, shall indure longer than a yeare and a day next after the *teste* or date of it. And so it is of an *essoigne de service le roy*. If a protection bear *teste 7. die Januarii*, and have allowance *pro uno anno*, the re-summons, re-attachment, or regarnishment, may be sued 8. *Januarii* the next yeare; and yet that is the last day of the yeare.

[o] Brit. fol. 262,  
263. & 260.  
Fleta, lib. 6.  
cap. 5. Acconil.

And where *Britton*, treating of an *essoigne* beyond the *Gracian* sea, in a pilgrimage, &c. saith thus, [o] *aucun gent nequident se purchaser nos lettres de protection patentes durable a un an, ou a 2 ou a 3 ans, et jalemeyns font attorneyns generals, ausi per nos lettres patentes: et ceux font bien et sagement, car nul grand seignior, ne chivalier de nostre realme, ne doit prendre chemyn sauns nostre conge, car issint poet le realme remainer disgarny de fort gente.*

Three things are hereupon to be observed. First, that this was a protection of grace, whereof more shall be said hereafter. Secondly, that it was for the safetie of the great men of the realme, and that they should make generall attorneyns, so as no actions or suits should be thereby staid. Thirdly (by the way), that great men could not passe out of the realme without the king's licence.

[p] 1 E. 3. 25.  
[q] 7 Co. 8.  
Calvin's case.  
7 E. 4. 29.  
F. N. B. 32.  
c. 6. b.  
7 H. 4. 14.  
19 H. 6. 35.  
38 H. 6. 3.  
32 H. 6.  
3 R. 2. Rot.  
Parliament nu.  
21. 23 E. 4.  
Protect. 18.  
8 R. 2. ibid. 125.  
11 H. 4. 57.  
Regist. Judic. 14.  
36 H. 6. tit. Protect. 27.  
6 R. 2. ibid. 14.  
Regist. orig. 22.  
supra.  
[r] Bract. li. 2.  
129, 140.  
Britton, 181.  
Fleta, lib. 6. ca.  
7, 8, &c.  
14 E. 2. Protect.  
109.  
34 E. 3. ib. 123.  
19 E. 3. ib. 78.  
33 E. 3. ib. 98.  
21 E. 3. 13.  
[s] 10 H. 6. Pro-  
tect. 106.

[p] A protection granted to one, &c. untill he be returned from *Scotland*, was disallowed for the incertaintie of the time.

[q] To the fourth, the protection, as well *moratura* as *profectura*, must be regularly to some place out of the realme of *England*, and that must be to some certaine place, as *super salvā custodiā Calicie*, &c. and not to *Carlisle* or *Wales*, which are within the realme, or to the like. But it may be to *Ireland* or *Scotland*, because they are distinct kingdomes; or to *Calice*, *Aquitaine*, or the like. But a protection *quia moratur super altum mare*, will not serve, not onely because (as some thinke) that *mare non moratur*, but for the incertaintie of the place, and for that a great part of the sea is within the realme of *England*.

[r] To the fifth, in some actions protections shall not be allowed by the common law; and in some actions they are ousted by act of parliament. Actions at the common law, as all actions that touche the crowne, as appeales of felony, and appeales [131. a.] of mayhem. [s] So where the king is sole partie, no protection is to be allowed; in like manner in a *decies tantum*, where the king and the subject are plaintifes; but, in late acts of parliament, protections

tections in personal actions are expressly ousted. A protection may be cast against the queene the consort of the king.

[t] In a writ of dower *unde nihil habet*, no protection is allowable, because the demandant hath nothing to live upon. Otherwise it is in a writ of right of dower. Likewise in a *quare impedit*, or assise of darreine presentment, a protection lieth not, for the imminent danger of the laps. Neither lieth a protection in assise of *novel disseisin*; because it is *festinum remedium*, to restore the disseisee to his freehold, whereof he is wrongfully and without judgement disseised.

[u] In a *quare non admisit*, a protection is not allowable, because it is grounded upon the *quare impedit*; and the like in a certificate upon an assise for the like reason; *et sic de similibus*. A protection *quia profecturus* is not allowable (as hath beene said) in any action commenced before the date of the protection, unlesse it be in a voyage royall. [w] An infant is vouched, and at the *pluries venire facias*, a protection was cast for the infant; and disallowed, because his age must be adjudged by the inspection of the court.

[x] By act of parliament no protection shall be allowed in an attaint (but at the common law a protection for one of the petite jury had put the plea without day for all); nor in an action against a gaoler for an escape; nor for victuals taken or bought upon the voyage or service: nor in pleas of trespassse, or other contract made or perpetrated after the date of the same protection.

[y] In a writ of error brought by an infant upon a fine levied, the plaintife sued a *scire facias* against the conusee, for whom a protection was cast, and the court examined the age of the plaintife, and by inspection adjudged him within age, and recorded the same, and then allowed the protection; and this can be no mischiefe to the plaintife; whereupon it followeth, that albeit the plaintife dyeth afterwards before the fine be reversed, yet, after his age adjudged and recorded, his heire shall in that case reverse the fine for the nonage of his ancestor. [a] And so it was resolved in the case of *Kekewiche* (1) in a writ of error brought by him, by the opinion of the whole court of the king's bench. Otherwise it is if the plaintife dyeth before his age inspected.

[b] Note, in judiciall writs which are in nature of actions, where the partie hath day to appeare and plead, there a protection doth lie; as in writs of *scire facias* upon recoveries, fines, judgements, &c. Albeit by the statute of W. 2. essoignes and other delays bee ousted in writs of *scire facias*, yet a protection doth lie in the same. So it is in a *quid juris clamat*, and the like. But in writs of execution, as *habere facias s. i. inam, elegit*, execution upon a statute, *capias ad satisfaciendum, fieri facias*, and the like, there no protection can bee cast for the defendant; because he hath no day in court, and the protection extendeth onely *ad placita et querelas*, and must be allowed by the court, which cannot bee but upon a day of appearance.

[c] In a writ of disceit brought against him that obtained and cast a protection upon an untrue surmise in delay of the plaintife, that protection is allowable. In an action brought upon the statute of labourers a protection doth lie, *et sic de similibus*.

[t] 39 H. 6. 39.  
43 E. 3. 6. &  
32. 37 H. 6. 1.  
F. N. B. 28.  
17 E. 3. 23.  
4 Co. 34.  
Bozon's case.  
Braet. lib. 5.  
fo. 139. 140.  
(3 Ro. Abr. 326,  
326.)

[u] 13 E. 3. 6.  
Protection 52.  
12 E. 3. 1b. 69.  
31 E. 1. 1b. 112.

[w] 19 E. 2.  
Protect. 111.  
32 E. 3. ibid. 54.

[x] 23 H. 8.  
c. 5. 34 E. 1.  
Protection 38.  
7 H. 4. c. 4.  
1 H. 2. cap. 8.

[y] 21 E. 3. 24.  
31 E. 3. Protect.  
97.  
8 E. 4. 50.  
34 H. 6. 43. 46.  
8 E. 4. 8.  
17 E. 3. 23.  
15 E. 3. Protect.  
73.  
(Post. 380. b.  
Mo. 79. 189.  
Cro. Jam. 230.)

[a] Pasch. 12.  
Ja. Regis in the  
King's Bench.

[b] 13 E. 3.  
Protect. 72.  
Fleta. 1. 2. c. 12.  
40 E. 3. 18.  
48 E. 3. 18, 19.  
37 H. 6. 32.  
21 E. 4. 19.  
18 H. 7. 8.  
47 E. 3. 5.  
17 E. 3. 69.  
14 E. 3. Protect.  
64.  
W. 2. cap. 45.

[c] 20 E. 3.  
Protect. 53.

To

[d] 38 H. 6. 2.  
Artic. super.  
Cart. 6.  
46 E. 3. Petition  
10.  
[e] 2 Co. 17.  
Land's case.  
8. Co. 68.  
Trullop's case.  
20 H. 6. 25.  
2 E. 4. 4.  
38 H. 6. 23.  
[f] 43 E. 3.  
Protect. 96.  
[f] 21 E. 4. 18.  
[g] 38 H. 6. 23.

[h] 44 E. 3. 12.  
47 E. 3. 6.

[i] 13 R. 2.  
6. 16.  
11 H. 4. 70.  
7 H. 6. 22.  
22 H. 6. 50.  
30 H. 6. 3.  
10 H. 6. 35.  
21 E. 4. 20.  
1 H. 6. 6.  
42 E. 3. 9.  
44 E. 3. 2.  
39 E. 3. 4. 5.  
40 E. 3. Protect.  
80.  
34 E. 3. ib. 119.  
[k] 44 E. 3. 4.  
12. 47 E. 3. 6.  
34 E. 3. Protect.  
319.  
28 H. 6. 3.  
34 H. 6. 22.  
30 H. 6. 3.  
32 H. 6. 4.

[l] Registrum  
361. b.  
F. N. B. 23. b.

[d] To the sixth, no writ of protection can be allowed, unless it be under the great seale [\*] and it is directed generally.

[e] To the seventh, the courts of justice, where the protection is cast, are to allow or disallow of the same, bee they courts of record or not of record, and not the sherife, or any other officer or minister.

[f] To the eighth, the protection may be cast, either by any stranger, or by the partie himselfe. An infant feme-covert, a monke, or any other, may cast a protection for the tenant or defendant. And this difference there is when a stranger casteth it, and when the tenant or defendant casteth it himselfe; [g] for the defendant or tenant casting it, he must shew cause wherefore he ought to take advantage of the protection; but an estranger neede not shew any cause, but that the tenant or defendant is here by protection.

[h] As to the ninth, a protection may be avoyded three manner of wayes. First, upon the casting of it before it be allowed. Secondly, by repeale thereof after it be allowed. (2) By disallowing of it many wayes; as for that it lieth not in that action, or that he hath no day to cast it, or for materiall variance betweene the protection and the record, or that it is not under the great seale, or the like. [i] Thirdly, after it be allowed, by *Innotescimus*; as if any tarry in the country without going to the service for which he was retained over a convenient time after that he had any protection, or repaire from the same service upon information thereof to the lord chancellor, he shall repeale the protection in that case by an *Innotescimus*. But a protection shall not be avoyded by an averment of the partie in that case, because the record of the protection must be avoyded by matter of as high nature.

[k] There is a clause in the protection to this effect: *fra-* [131. b.]  
*sentibus minime valituris, si contingat ipsum, &c. à cus-*  
*todia castri predicti recedere.* Or, *si contingat iter illud non arri-*  
*perere, vel infra illum terminum à partibus transmarinis redire.*  
Whereupon there be two conclusions to bee observed.

First, that though the protection be allowed by the court for a yeare, yet if it be repealed by an *Innotescimus*, that the re-sommons or re-attachment shall be granted upon the repeale within the yeare; for the protection that was allowed had the said clause in it. And of that opinion be our later bookes; and the repeale by *Innotescimus* should serve for little purpose, if the law should not be taken so.

Secondly, that albeit he that had the protection, either *morature* or *profectura*, retorne into *England*, and haply be arrested and in prison, yet, if he came over to provide munition, habiliments of warre, victuals, or other necessities, it is no breach of the said conditional clause, nor against the act of 13 *Richard 2.* cap. 16. for that in judgement of law comming for such things as are of necessity for the maintenance of the warre, *moraturæ* according to the intention of the protection and statute aforesaid. And thus much of the two first protections, *cum clausula volumus, profectura* and *morature*.

[l] As to the third protection *cum clausula volumus*, the king by his prerogative regularly is to be preferred in payment of his duty  
or

(2) The sense requires *thirdly* here; and that, where *thirdly* is, it should be *fourthly*.

But the print in the former editions is as we have given it.

or debt by his debtor before any subject, although the king's debt or duty be the latter; and the reason hereof is, for that *thesaurus regis est fundamentum belli, et firmamentum pacis*. (1) And thereupon the law gave the king remedy by writ of protection to protect his debtor, that he should not be sued or attached untill hee paid the king's debt. But hereof grew some inconvenience, for to delay other men of their suits, the king's debts were the more slowly paid. And for remedie thereof [m] it is enacted by the statute of 25 E. 3. that the other creditors may have their actions against the king's debtor, and proceed to judgement, but not to execution, unlesse he will take upon him to pay the king's debt, and then he shall have execution against the king's debtor for both the two debts.

This kind of protection hath (as it appeareth) no certaine time limited in it. But in some cases the subject shall be satisfied before the king; [n] for regularly whensoever the king is intituled to any fine or duty by the suit of the party, the party shall be first satisfied, as in a *decies tantum*. And so if in an action of debt the defendant denie his deed, and it is found against him, he shall pay a fine to the king, but the plaintife shall be first satisfied; and so in all other like cases. And so it is in bills preferred by subjects in the star-chamber, there costs and damages (if any be) shall be answered before the king's fine, as it is daily in experience.

The fourth protection *cum clausula volumus* is, when a man sent into the king's service beyond sea is imprisoned there, so as neither protection *prefectura* or *moratura* will serve him; and this hath no certaine time limited in it; [o] whereof you shall reade at large in the *Register*, and *F. N. B.*

[p] Now we are at length come to protections *cum clausula nolumus*; all which, saving one, are of grace, and, as hath beene said, are implied under the generall protection; for, as *Fitzherbert* saith, every loyall subject is in the king's protection. Of these protections of grace, you shall not read much in our yeare bookes, because they stayed no actions or suites. [q] Of the divers formes of these you shall reade at large in the *Register*, and *F. N. B.* which were too long and needlesse to be here recited.

The protection *cum clausula nolumus*, that is of right, is, that every spirituall person may sue a protection for him and his goods, and for the fermors of their lands and their goods, that they shall not be taken by the king's purveyor, nor their carriages or chattels taken by other ministers of the king, which writ doth recite the statute of 14 E. 3.

Of these protections I cannot say any thing of mine owne experience; for albeit queene *Elizabeth* maintained many warres, yet she granted few or no protections; and her reason was, that he was no fit subject to be employed in her service that was subject to other mens actions, lest she might be thought to delay justice (2).

(1) See ante 30. b.

(2) [See Note 206.]

33 H. 2. c. 20.  
in the preamble.  
41 E. 3. tit.  
Execution 38.  
18 E. 3.  
ibid. 66.  
27 E. 3. 28. b.  
4 E. 4. 16.  
3 Eliz. Dier 197.  
Rot. Pat.  
27 E. 3. part.  
1. m. 2.  
[m] 25 E. 3.  
cap. 19.  
(Cro. Cha. 390.  
390. Hob. 115.)

[n] 41 E. 3. 15.  
17 E. 3. 73.  
29 E. 3. 18.  
4 E. 4. 16.

[o] Regist. impo.  
F. N. B. 22. c.

[p] Vide 7. Co. 2.  
9. Calvin's case.

[q] Regist. 280.  
280. F. N. B. 29.  
A. B. C. D. E. F.  
G. H. Register 280.  
Statute de 14. E. 3.  
F. N. B. 30. A.

## Sect. 200.

**L**E 5. est, un home que est enter et professe en religion. Si tiel suist un action, le tenant ou defendant poit monstrer, que tiel est enter en religion en tiel lieu, en l'order de Saint Benet, et la est moigne professe, ou an l'order des friers, preachers ou minors, et la est frere professe, et issint des autres ordres de religion, &c. et demaundera judgement s'il serra respondue. Et la cause est; pur ceo que quant un home entra en religion, et est professe, il est mort en ley, et son firs, ou auter cousin maintenant luy enheritera, auxy bien sicome il fuit mort en fait. Et quant il entra en religion, il poit faire son testament, et ses executors; les queux executors averont un action de det due a luy devant l'entre en religion, ou auter action que executors poient aver, sicome il fuit mort en fait. Et s'il ne fait ses executors quant il entra en religion, donques l'ordinarie poit committer l'administration de ses biens a autres homes, sicome il fuil mort en fait.

**T**HE fifth is, where a man is entred and professed in religion. If such a one sue an action, the tenant or defendant may shew, that such a one is entred into religion in such a place, into the order of Saint Benet, and is there a monke professed, or into the order of friers, minors or preachers, and is there a brother professed, and so of other orders of religion, &c. and aske judgement if he shall be answered. And the cause is this; that when a man entreth into religion, and is professed, he is dead in the law, and his sonne, or next cousin incontinent shall inherit him, as well as though he were dead indeed. And when he entreth into religion, he may make his testament, and his executors; and they may have an action of debt due to him before his entry into religion, or any other action that executors may have, as if he were dead indeed. And if that he make no executors when he entreth into religion, then the ordinary may commit the administration of his goods to others, as if he were dead indeed.

[a] Bract. lib. 5. fo. 415. 431.  
Brit. ca. 22.  
fo. 39. Fleta,  
lib. 6. ca. 41.  
§ E. 2. 67.  
Nonabill. 20.  
3 H. 6. 24.  
1 E. 3. 9.  
7 H. 4. 2.  
Doctr. & Stud.  
141. 21 R. 2.  
Judgment 203.  
11 R. 2. ib. 107.  
(Post. 136. a.)  
[b] 4 H. 4. ca. 17.  
25 H. 8. ca. 12.

**E**NTRY et professe en religion." [a] It is to be observed, that a man doth enter into religion at his first comming, and liveth under obedience; but hee is not professed, till a yeare be past, or some time of probation. And he is said to be professed, when he hath taken the habit of religion, and vowed three things, obedience, wilfull poverty, and perpetual chastity. And therefore our author saith here, *enter et professe*.

"*En l'order des freres, preachers ou [b] minors.*" It appeareth in our bookes, that of friers there were foure orders, viz. minors, augustins, preachers, and carmelites; and the *franciscani*, *capuchini*, and *observantes*, are included under the title of minors; and they were called observants, because they bee not conventuall or joyned together in a brotherhood, but live separately, and bind themselves to observe more strictly the rites of their order. [c] *Cum quis semel se religioni contulerit, renunciat omnibus que seculi sunt, habitū distinctione, utrum habitum probationis suscepit, vel habitum professionis.*

[c] Bracton, fo. 431. b.

[d] Bracton, fo. 301. 426.

"*Il est mort en ley.*" *Civiliter mortuus, or mortuus seculo.*  
[d] There is a death in deede, and there is a civill death, or a death

death in law, *mors civilis* and *mors naturalis*, as here it appeareth; and therefore to oust all scruples, leases for life are ever made during the naturall life, &c. (1) If the father enter into religion, then shall his sonne and heire have an assise of mordancester, and the writ shall say, [e] *Si W. pater, &c. die quo obiit habitum religionis assumpsit, in quo habitu professus fuit, ut dicitur.*

Britton, fo. 226.  
280, 281.  
Fleta, lib. 6.  
ca. 41.

[e] F. N. B. 196.  
§ E. 4. 3.

[132. b.] "*Auxibien come il fuit mort en fait.*" But yet to three purposes, profession, that is, the civill death, hath not the effect of a naturall death.

First, this civill death shall never derogate from his owne grant, nor be any mean to avoid it. And therefore if tenant in taile maketh a feoffment in fee, and entrench into religion, his issue shall have no formedon during his life; because that should be in derogation of his own grant, and be a meane to avoyd the same.

[f] Secondly, it shall never give her availe, without whose consent he could not have entred into religion, and therefore his wife after his civill death shall not be indowed, untill his naturall death. But if the wife, after her husband hath entred into religion, alien the land which is her owne right, and after her husband is deraigned, the husband may enter and avoid the alienation.

(F. N. B. 213. A.)

[f] 32 E. 1.  
Dower 176.  
31 E. 3. Col-  
lusion 29.  
33 E. 8.  
Entre Conge 62.  
31 E. 4. 14.  
(Ante 33. b.)

Thirdly, it shall not worke any wrong or prejudice to a stranger that hath a former right; and therefore if the disseisor entrench into religion, and is professed, so as the land descends to the heire, yet this descent shall not tolle the entrie of the disseisee.

[g] A woman cannot be professed a nunne during the life of her husband. But some do hold a diversitie [h] that *ante carnalem copulam*, the husband or wife may enter into religion without any consent, but *post carnalem copulam* neither of them can without consent of the other.

[g] 5 E. 4. 3. a.  
[h] 18 H. 6.  
33. per Fortesc.

[i] But if a man holdeth lands by knights service, and is professed in religion, his heire within age, he shall be in ward. [k] If I be disseised, and my brother releaseth with warranty, and is professed in religion, and the warranty descendeth upon me, this warrantie shall binde me; because I am his heire, and such inheritance as my brother had shall descend upon me.

[i] 31 E. 3.  
Collusion 29.  
[k] 34 E. 3.  
Garranty 71.  
Vid. the Chapter  
of Warranty, Sect.

[l] And if one joyntenant be professed in religion, the land shall survive to the other. If a man or woman be professed in religion in *Normandie*, or in anie other foraine part, such a profession shall not disable them to bring any action in *England*, because it wanteth triall; but they must be professed in some house of religion within this realme, for that may be tried by the certificate of the ordinarie, so as of foraigne professions the common law taketh no knowledge (1). [m] And yet in some case one that is professed in religion within the realme shall have an action: as if he be made an executor, or if he be an administrator, he shall maintaine an action, not in his owne right, but in right of the dead.

[l] 21 R. 2.  
Judgm. 203.  
(Post. 181. b.)

[n] If a monke be made a bishop, or a parson, or a vicar, he shall have an action concerning his bishopricke, parsonage, or vicarage, *et sic de similibus.*

[m] 10 E. 3. 511.  
14 E. 3. Execu-  
tors 87.  
5 H. 7. 25.  
21 H. 6. 30.  
3 H. 6. 24.  
[n] 44 E. 3. 9.  
Nonability 3.  
14 H. 8. 14.

And

(1) [See Note 207.]

[132. b.]

(1) See ante 3. b. n. 7. to which add the

arguments in the case of *Thornby and Fleetwood*, 1. Stra. 347. Com. 207. 10. Mod. 113. 356. 406.

[c] 2 H. 4. 7.  
 8 H. 4. 6.  
 7 E. 4. 36.  
 44 E. 3. 4.  
 20 E. 3.  
 Vill. 10. & Non-  
 ability 9.  
 49 E. 3. 4.  
 [r] Eract. 3b.  
 41b, 41c. 490.  
 Mir. c. 2. sect. 14.  
 14 H. 4. 37. b.  
 8 H. 7. 26.  
 Vid. Sect. 200.  
 14 E. 4. 36.

[p] Mir. ubi supra.

[g] 22. Ass. 87.  
 21 E. 3. 41, 42.  
 20 E. 3. 2.  
 37 H. 6. 1.  
 23 E. 4. 36.  
 Eract. 1. s. 2. 41b.  
 490. 13 E. 3.  
 Bro. 361.  
 20 E. 3. 2.  
 24 H. 6. 7. b.  
 24 E. 3. 34. b.  
 45. 7 E. 2.  
 Nonability 3. 9.

[r] 4 H. 2.  
 Bro. 766.

[p] 2 H. 4. 7. a.  
 (1. Bulstr. 146.  
 34p. 7. 206. 351.  
 1. Ho. Rep. 693.)

[q] 10 E. 3. 53.

[u] 1 H. 4. 1. b.

Pl. in Parliam.  
 10 E. 1.

[o] And if a monke be farmer of the kinge, yeelding a rent, he shall have an action concerning that ferme. And albeit *Littleton* speaketh generally of one that is professed in religion, yet must it not be understood of the soveraigne or head of the religious house, as of the abbot, prior, or the like; [\*] for albeit they be professed in religion, yet by the policie of the law, they are persons able to purchase, and to implead and to be impleaded, to sue and to be sued, for any thing that concerns the house of religion; for otherwise the house might be prejudiced, and other men also of their lawful actions. And this is the ancient law of *England*, as it appeareth in these words, [h] *des biens des gens de religion arpent l'action al chiefe en son noame pur luy et son covent*. But what if a monke, &c. were beaten, wounded, or imprisoned, &c. doth the law give no remedie therefore? Yes, verily; [g] for in that case the abbot and the monke shall joyne in an action against the wrong doer; and if the writ be *ad damnum ipsius prioris*, the writ is good; and if it be *ad damnum ipsorum*, it is good also. Also if a monke be by conspiracie falsely and maliciously indicted of felony and robberie, and afterwards is lawfully acquitted, his soveraigne and he shall joyne in a writ of conspiracie and the like. And where *Littleton* speaketh of a man that is professed in religion, the same law is of a nunne, *sanctimonialis, mutatis mutandis*.

[r] A wife is disabled to sue without her husband, as much as a monke is without his soveraign; and yet we read in books that in some cases a wife hath had abilitie to sue and be sued without her husband: [s] for the wife of sir *Robert Belknaf*, one of the justices of the court of common pleas, who was exiled or banished beyond sea, did sue a writ in her owne name, without her husband, he being alive; whereof one said, *ecce modo mirum, quod femina fert brevec regis, non nominando virum conjunctum robore legis*.

[t] King *Edward* the third brought a *quare impedit* against the lady of *Maltravers*; and she pleaded that she was covert of baron; whereunto it was replied for the king, that her husband the lord *Maltravers* was put in exile for a certaine cause; and she was ruled to answer.

[u] King *Henrie* the fourth brought a writ of ward against *Sibbel B.* who pleaded, that shee was covert baron, &c. whereunto it was replied for the king, that her husband for a crime that he had committed against the king and the peeres, was relegate or exiled into *Gascoigne*, there to remaine untill he obtained the king's grace: and *Gascoigne* chiefe justice, *ex assensu sociorum*, awarded that she should answer.

Sir *Tho. Egerton*, lord chancellor, in his argument which he published apart by himselfe in *Calvin's* case *de post natis* demand-  
 ed what former president there was for the warrant of the [138. a.]  
 lady *Belknaf's* case in 2 H. 4. 7. (1) which occasioned me to search, and upon search I found, that the like judgment had bin given before at the parliament holden in *Crast. Epiph. an. 19 Edw. 1.* where the case was, that *Thomas* of *Weyland* being abjured the realme for felony in the yeare before, *Margerie de Mose* his wife, and *Richard* sonne of the said *Thomas*, exhibited their petition of right unto the parliament, for the manor of *Sobbir*, wherein her husband had but an estate for life joyntly with her, and the inheritance in *Richard* the son by fine. The earle of *Gloucester*, lord of the fee, (who  
 claiming



claiming the land by escheat, had taken the possession thereof) alleged, *quodd non fuit juri consonum, quodd aliqua femina intraret in aliquas terras vivente marito suo, eod quodd prefatus Thomas abjuravit regnum, et adhuc vivit; et asserit idem comes nunquam hujusmodi casum accidisse, et inde petit post multas allegationes, quodd possit predictum manerium tenere ut escheatam suam. Super quo fieri istum dominum regem preceptum fuit, quodd tam justiciarii sui de utroque banco quam ceteri de regno suo, tam milites quam servientes in legibus et consuetudinibus Angliæ experti, mandarentur, quodd essent coram rege et ejus consilio, &c. ad certiorandum ipsum, regem, qualiter et quomodo in casu isto fuerit procedendum, et qualiter temporibus preteritis et antecessorum suorum in casibus consimilibus fieri consuevit, et interim scrutantur recorda de consimilibus; ubi recitantur duo vel tres consimiles casus. Et quia, licet prius non videbatur aliquibus juri consonum fuisse, quodd uxor in vita viri secundum antiquam ecclesiam, qualiter cunque deliquisset quoad forum regium, non posset nec deberet à viro suo separari, et sic quicquid foret in possessione uxoris converteretur in potestatem viri sui, et hoc manifeste imminueret contra consuetudinem regni; et etiam quia quidam dubitabant, quodd de possessionibus et bonis uxoris vir possit aliqualliter sustentari: tamen coram consilio domini regis, vocatis thesaurariis et baronibus et justiciariis de utroque banco, concordatum est, quodd predicta Margeria habeat talem seisinam, &c. secundum purportum finis predicti &c. (2) Patet etiam consimile exemplum tempore Henrici patris regis. I have cited this solemn resolution the more at large, because there may be many excellent things to be observed in it: so as by that which hath been said, it plainly appeareth, that this opinion concerning the hability of the wife of a man abjured or banished, was not first hatched by the judges in Henry the fourth's time. And here is to be observed, that an abjuration, that is, a deportation for ever into a forreine land, like to profession, (whereof our author speaketh here) is a civill death; and that is the reason that the wife may bring an action, or may be impleaded during the natural life of her husband. And so it is, if by act of parliament the husband bee attainted of treason or felony, and saving his life, is banished for ever, as *Belknap*, &c. was, this is a civill death, and the wife may sue as a *feme sole*. And hereby you may understand your bookes, which treat of this matter. But if the husband, by act of parliament, have judgement to be exiled but for a time, which some call a relegation, that is, no civill death, (3). And in 8 E. 2. an abjuration is called a divorce betweene the husband and wife. *Sed opus est interprete*; for by law no subject can be exiled or banished his country, whereby he shall *perdere patriam*, but by authority of parliament, or in case of abjuration, and that must be upon an ordinary proceeding in law, as it was in this case of *Weyland*.*

Another example we have in our bookes to this effect. If the husband had aliened the land of his wife, and after had committed felony and beene abjured the realme, the wife shall have a *cui in vita* in his life-time, agreeable with the said resolution in parliament, for that the abjuration was a civill death (4).

See in the *Register*, a woman was banished out of the towne of *Calice* for adultery, by the law or custome of that place, and there appeareth *charta pardonationis pro muliere bannita*. *Sed nos non habemus talem consuetudinem*.

Note the ancient trial of difficult matters in law.

The great authority of judicial records and precedents.

A solemn resolution of the law in this point.

(3) Inst. 217.  
9 E. 2. Coram.  
425.  
So resolved in parliament upon the making of the statute of 35 E. 1. c. 1. *exilium Hugonis de Spencer patris et filii tempore E. 2. 31 E. 1. Cui in vita 31. (Anno 2. a.)*

Regist. fol. 315 b.

But

(2) [See Note 208.]

(3) [See Note 209.]

(4) [See Note 210.]

[a] Vide in my  
preface to the  
Sixth Booke.  
This was law be-  
fore the Conquest.

10 E. 3. 26. b. 4

30 E. 3. 5.

18 E. 3. 1.

23 E. 3. 21.

49 E. 3. 4.

49 Ass. 8.

11 H. 4. 67.

14 E. 3.

Voucher 110.

20 E. 3.

Nonahil. 9.

31 E. 3. Quar. imp. 146. 3 H. 7. 14. 19 H. 6. 2. 28 H. 6. 13. 7 E. 7. 7. a. 26 H. 6. Aile le roy 24. Flac. E. 2. ca.

63. in Finc. Pl. Com. 231. Stanf. Prer. 10. b. (Ante 3. a.)

[2] 18 E. 3. 2.

23 E. 3.

Brief 916.

F. N. B. 101. a.

[c] 18 E. 3. 22.

24 E. 3. 35. 76.

[d] 31 E. 3.

Enc. 346.

9 E. 3. 33.

[e] F. N. B. 235. A.

[f] F. N. B. 1. F.

[g] 14 E. 3.

Voucher 110.

21 E. 3. 53.

23 E. 3. 3. b.

17 E. 3. 65.

10 E. 3. 17.

5 E. 3. 4.

15 E. 3. Aide

del roy 66.

10 E. 3. 18.

26 H. 6. Aide

le roy 34.

[A] 21 E. 3. 13.

34 E. 3.

Protest. 122.

11 H. 4. 67. b.

[I] 30 E. 3. 5.

[K] L'estat. de

25 E. 3. de Prodi-

tionibus.

[7] Rot. Parl.

3 H. 6. m. 7.

[m] 4 E. 4. 25.

6 E. 4. 4.

48 E. 3. 10. a.

18 E. 4. 19.

22 H. 6. 4.

5 H. 7. 25. b.

[a] But by the common law, the wife of the king of *England* is an exempt person from the king, and is capable of lands or tenements of the gift of the king, as no other feme covert is, and may sue and be sued without the king; for the wisdom of the common law would not have the king (whose continuall care and study is for the publike, *et circa ardua regni*) to be troubled and disquieted for such private and petty causes: so as the wife of the king of *England* is of ability and capacity to grant and to take, to sue and be sued as a feme sole by the common law.

[b] And such a queene hath many prerogatives; as, she shall find no pledges, for such is her dignity, as she shall not be amerced.

The queene nor the king's sonne are restrained by the statute of 1 H. 4. cap. 6. concerning grants by the king.

[c] In a *quare impedit* brought by her, some say, that plenarty is no plea, no more than in the case of the king.

[d] If any bailife of the queene's bring an action concerning the hundred, he shall say, *in contemptum domini regis et reginae*. [133. b.]

The queen shall pay no talle.

[e] If the tenant of the queene alien a certaine part of his tennance to one, and another part to another, the queene may distraine in any one part for the whole, as the king may doe; but other lords shall distraine but for the rate; and therefore where the queene so distraineth, there lyeth a writ *de onerando pro rata portione*. [f] The writ of right shall not be directed to the queene no more than to the king, but to her bailife. Otherwise it is when any other is lord.

[g] In case of aide prier of the queene, it is *domina regina inconsulta*, and the cause of the aide prier shall not be counterpleaded no more than in the king's case. And see where the aide shall be granted of the king and queene, and where of the queene onely, and she of the king. [h] But a protection shall be allowed against the queene, but not against the king. Neither shall the queene be sued by petition, but by a *precipe*. [i] The queene is not bound by the statute of *Marlebridge* for driving a distresse into another county.

[k] If any doe compass the death of the queene, and declare it by any overt fact, the very intent is treason, as in the case of the king.

[l] No man may marry the queene dowager without the king's licence. (1) But let us now returne to *Littleton*.

"*Il poet faire son testament et ses executors, &c.*" [m] If *A.* be bound to the abbot of *D.* *A.* is professed a monke in the same abby, and after is made abbot thereof, he shall have an action of debt against his owne executors.

"*Donques l'ordinary poet committer administration, &c. sicome il fult en mort fait.*" [n] Note the statute of 31 E. 3. ca. 11. that giveth actions to the administrators, speaketh of a man that dies intestate, which by the authority of *Littleton* extendeth as well to a civill death as to a naturall.

[n] Pl. Com.  
280, 281. Greis-  
brooke's case.

## Sect. 201.

**L**E 6. est, lou un home est excommen-  
ge per la ley de saint esglise,  
et il suist un action reall ou personal  
le tenant ou defendant poit pleder, que  
celuy, que suist, est excommen-ge, et de  
ceo corvient monstrier lettre de l'evesque  
south son seale, tesmoignant l'excom-  
mangement, et demaundera judge-  
ment, s'il serra respondue, &c. Mes  
en cest cas, si le demandant ou plain-  
tife ceo ne poit dedire, le breve n'aba-  
tera my, mes le judgement serra, que  
le tenant ou defendant alera quile  
sans jour, pur ceo, que quant le de-  
mandant ou plaintife ad purchase les  
letters de absolution, et ceux sont  
monstres a le court, il poit aver un  
resommons, ou reattachment, sur son  
original, solonque la nature de son  
briefe. Mes en les autres 5. cases le  
briefe abatera, &c. si le matter monstre  
ne poit estre dedit.

**T**HE sixth is, where a man is  
excommunicated by the law of  
holy church, and he sueth an action  
reall or personall, the tenant or de-  
fendant may pleade, that he, that  
sueth is excommunicated, and of this  
it behoves him to shew the bishop's  
letters under his seale, witnessing  
the excommunication, and aske  
judgement, if he shall be answered,  
&c. But in this case, if the de-  
mandant or plaintife cannot deny  
it, the writ shall not abate, but the  
judgment shall be, that the tenant  
or defendant shall go quit without  
day, for this, that when the de-  
mandant or plaintife hath purchased  
his letters of absolution, and shewed  
them to the court, he may have a  
resummons, or a reattachment, upon  
his original, after the nature of his  
writ. But in the other five cases  
the writ shall abate, &c. if the matter  
shewed may not be gainsaid.

**“EXCOMMENGEMENT, excommunicatus, excommunicatio.”** [a]  
*Sicut quis poterit habere lepram in corpore, ita et in animâ.  
Excommunicato interdicitur omnis actus legitimus, ita quod agere non  
potest, nec aliquem convenire, licet ipse ab aliis possit conveniri.*

*Excommunicatio est nihil aliud quam censura à canone vel iudice  
ecclesiastico prolata et inflicta, privans legitimâ communione sacra-  
mentorum, et quandoque hominum. [\*] It is divided into the greater  
and the lesser. Minor est, per quam quis à sacramentorum partici-  
patione conscientia vel sententia arceatur. Major est, quæ, non solum  
à sacramentorum, verum etiam fidelium communione excludit, et ab  
omni actu legitimo separat et dividit. But either of them both disableth  
the party. [b] Cum excommunicato, autem, nec orare nec loqui, nec  
phalam, nec absconditè, nec vesci licet, exceptis quibusdam personis.*

[134. a.] But every excommunication disableth not the party. [c] If  
bailifes and commons, or any other corporation aggregate  
of many, bring an action, *excommengement* in the bailifes shall not  
disable them, for that they sue and answer by attorney. Otherwise  
it is of a sole corporation. But if executors or administrators be  
excommunicated, they may be disabled; because they, which  
converse with a person excommunicate, are excommunicate also.  
[d] If a bishop be defendant, an excommunication by the same  
bishop against the plaintife shall not disable him, and it shall be in-  
tended for the same cause, if another be not shewed.

“Lettre

[a] Bracton, lib.  
5. fo. 415. 426  
437. Fleta, lib.  
6. c. 44.  
Britton, ca. 49.  
fol. 126.  
(F. N. B. 62.  
Doctr. Plac. 8.)  
[\*] F. N. B. 64. F.)

[b] Bracton,  
436. b. acc.  
[c] 30 E. 3. 15.  
42 E. 3. 13.  
21 H. 6. 30.  
21 E. 4. 49.

[d] See Artic.  
Cl-ri, ca. 7.  
5 E. 3. 8.  
8 E. 3. 70.  
9 H. 7. 21.  
10 H. 7. 8, & 9.  
18 E. 3. 58.

[c] Bracton,  
lib. 2. fo. 430. b.  
23 E. 4. 15.  
20 H. 6. 17.  
20 E. 3. Excom-  
munication  
20. 33 E. 3.  
ibid. 29.  
44 E. 3. ibid. 23.  
11 H. 4. 14.  
F. N. B. 64, 65.  
229. 7 E. 4. 14.  
8 H. 6. 3.

Registr. 67.  
1 Co. 68.  
1 Re. Abr. 283.)  
[f] 11 H. 4. 68.  
in Debt.

[g] 33 E. 3.  
Excom. 20.  
F. N. B. 65.  
(By. 371. b.  
4 Inst. 267.)

[h] 16 E. 3.  
Excom. 4.  
31 E. 3. ibid. 4.  
2. 6. 20. Ass. 19.  
F. N. B. 64.  
4 H. 7. 15.

23 E. 4. 15.  
14 H. 4. 14.  
[i] 14 E. 3.  
Excom. 8.  
8 E. 2. ibid. 25.

[j] Hill. 14 E. 3.  
Coram reg.  
London, in Tho-  
mas.

(Ante 97. a.  
Post. 344.)  
[k] 17 E. 3.  
R. 40. 25 E. 2.  
emp. de Provis.

25 H. 8. ca. 10.  
3 Co. 75. le  
ense de decene &  
chapter de Nor-  
wich. Mat. Par.

pag. 63. Vid.  
Sect. 133, 134.  
[m] Rot. Patent.  
15. January, 17  
Regis Johannis.

Mat. Par. pag.  
222. 35 E. 1.  
Lestat. de Car-  
mle. 26 E. 3.

Lestatut. de  
Provis. 13 R. 2.  
ca. 2.  
[n] 25 H. 8.  
ca. 20.

[o] 2 E. 3. Corone,  
160.  
8 E. 3. 59.  
24 E. 3. 33.  
44 E. 3. 28.  
8 E. 3.  
Commane 88.  
(2 Re. Abr. 289.)

[p] 41 E. 3.  
42 E. 3.  
18 E. 3. 61.  
14 H. 4. 25.  
3 H. 4. 12.  
Registr. 7. 2.  
F. N. B. 6 E.

"*Lettre del évesque south son seale.*" [e] None can certifie excommengement but only the bishop, unlesse the bishop be beyond sea or in *remotis*; or one that hath ordinary jurisdiction, and is immediate officer to the king's courts, as the archdeacon of *Richmond*, or the dean and chapter in time of vacation. [f] But in ancient time every official or commissary might testify excommengement in the king's court; and for the mischief that ensued thereupon, it was ordained by parliament, that none should testifie excommengement but the bishop only.

[g] If a bishop certifie that another bishop hath certified him, that the partie which is his diocesan is excommunicated, this certificat upon another's report is not sufficient. [h] If the bishop of *Rome*, or any other having foraigne authority, doth excommunicate any subject of this realme, and certifieth so much under his seale of lead, this shall not disable the party; for the common law disallows all acts done in disability of any subject of this realm by any foraine power out of the realme, as things not authentique, whereof the judges should give allowance. [i] If the bishop certifieth the excommunication under seal, albeit he dyeth, yet the certificate shall serve. [k] *Si quis immodatus fuerit per excommunicationes diversas pro diversis delictis, et profert literas absolutionis de una sententiâ, non erit absolutus, quousque de omnibus aliis absolvatur.*

"*Evesque.*" *Episcopus*, a bishop, is regularly the king's immediate officer to the king's court of justice in causes ecclesiasticall, and all the bishopricks in *England* are of the king's foundation, and the king is patron of them all; [l] and at the first they were donative, and so it appears by our bookes, and by acts of parliament, and by history, and that was *per traditionem annuli & pastoralis baculi*, i. e. the crosier (1). And king *Henry* the first, being perswaded by the bishop of *Rome* to make them elective by their chapter or covent, refused it (2). [m] But king *John* by his charter acknowledging the custome and right of the crowne in former times, yet granted *de communi consensu baronum*, that they should bee eligible, which after was confirmed by divers acts of parliament. And afterward the manner and order, as well of election of archbishops and bishops, as of the confirmation of the election and consecration, is [n] enacted and expressed in the statute of 25 *H. 8.* But by the statutes of 31 *H. 8.* and 1 *E. 6.* (3) they were made donative by the king's letters patents, both which statutes are repealed (4), and the statute of 25 *H. 8.* doth yet remaine in full force and effect (5).

And where *Littleton* saith, that the bishop under his seale must testifie, &c. it is to be knowne, [o] that none but the king's courts of record, as the court of common pleas, the king's bench, justices of gaole delivery, and the like, can write to the bishop to certifie bastardy, mulierty, loyaltie of matrimony, and the like ecclesiasticall matters; for it is a rule in law, that none but the king can write to the bishop to certifie; and therefore no inferiour court, as *London*, *Norwich*, *Yorke*, or any other incorporation, can write to the bishop, but [p] in those cases the plea must be removed into the court of common

(1) [See Note 212.]

(2) [See Note 213.]

(3) [See Note 214.]

(4) [See Note 215.]

(5) [See Note 216.]

common pleas, and that court must write to the bishop, and then remand the record againe. And this was done in respect of the honor and reverence which the law gave to the bishop, being an ecclesiastical judge, and a lord of parliament by reason of the [134. b.] baronie which every bishop hath. (1) And this was the reason [a] a *quare impedit* did not lye of a church in *Wales* in the county next adjoyning, for that the lordship's marchers could not write to the bishop: [b] neither shall consuance be granted in a *quare impedit*, because the inferior court cannot write to the bishop. And herewith agreeth antiquitie. [c] *Nullus alius proter regem potest episcopo demandare inquisitionem faciendam*. [d] And another speaking of loyaltie of marriage, *nec alius quam rex super hoc demandaret episcopo, quod inde inquireret. Episcopus alterius mandatum, quam regis, non tenetur obtemperare*. And therewith agreeth *Britton* also.

[a] 2 E. 2. 37.  
30 H. 6. 22.  
tit. Quar. Imp.  
Brooke 100.  
35 H. 6. 30.  
21 H. 6. 3.  
24 E. 3. 23.  
[b] 13 E. 3.  
Consuans 41.  
Jurisdic. 84.  
40 E. 3. 2.  
Vide Sect. 134.  
[c] *Britton* lib. 3.  
105.  
[d] *Fleta*, lib. 5.  
cap. 14. *Britton*,  
fol. 206. b.

"*Le briefe n'abatera, &c.*" *Abater* is a French word, and signifieth *destruere*, or *prostrernere*, to destroy or prostrate. And *abatement de briefe* is a prostration or overthrowing of the writ.

[\*] "*Alera quite sauns jour, &c.*" That is, to goe quiet without any continuance to any certaine day; and therefore the defendant is not bound to any certaine attendance, untill the party purchaseth his letters of absolution, and the reattachment or resummons be sued, the entry of which award is, *Ideo loquela predicta remaneat sine die quousque, &c.*

[\*] *Britton* lib. 5.  
fol. 429.  
11 E. 2. Excom.  
23. 13 E. 4. 2.  
6 Ass. p. 42.  
Vide Sect. 92b.

"*Jour.*" *Dies*, [c] in legall understanding is the day of appearance of the parties, or continuance of the plea. And you shall understand, that first in reall actions there are *dies communes*, common dayes, whereof you shall reade in divers ancient statutes.

[f] Also in all summons upon the originall there must be fifteene dayes after the sommons before the appearance. [g] But if the originall be returned *tarde*, and *sommons alias* goeth forth, there must be nine returnes between the *teste* and the returne. And so in other judiciall processe in reall actions, saving if consuans be demanded to be holden within his mannor, there processe shall be awarded from three weekes to three weekes.

And before the statute of *articuli super chartas*, in all sommons and attachments in plea of land there shall be contained the terme of fifteene dayes. [g] And it appeareth as well by the statute as by the ancient authors of the law, who wrote before the statute, that this was the ancient common law; and the reason of these long dayes given in reall actions was the recovery being so dangerous, that the tenant might the better provide him both of answer and of proofes. [\*] But by consent they may take other than common dayes.

And it is not amisse to note what the ancient law was in proceeding against a man for his life. And therefore heare what *Britton* saith: *Sur le presentment de cest felony* (under which he includeth also treason) *voilons nous* (for he wrote in the king's name) *que trestous ceux, que ent serr' endites, face le viscont hastiment prendre, et assement leur corps en prison garder, el que ilz sont menes devant nous, ou devant nos justices; et sur ceo que nulluy ne soit disgarnis de*

[c] 31 H. 3. cap.  
1. & 2. Marlebr.  
ca. 12.  
32 H. 6. ca. 31.

[f] *Articuli*  
super Cart. ca. 15.  
23 E. 1.  
[g] 2 H. 6. 30.  
30 H. 6. 35.  
3 Eliz. Dier 253.  
(2. Inst. 567.)

[g] *Mirres*, cap.  
2. sect. 19.  
*Britton* lib. 3. fol.  
204. & lib. 4.  
fol. 255. *Brit.*  
fol. 279. b.  
*Fleta*, l. 6. c. 6.  
13 E. 4. 15.  
[\*] 11 H. 6. 23.  
15 E. 3. Jour. 22.  
21 E. 3. 29.  
15 Ass.

*Britton*, fo. 19. b.

(1) [See Note 217.]

*de leur respons, voilons que ceux, que isent soient prise, que ilz eynst temps de purveyer leur respons 15 jour au meyns aliz le prient, et en dementiers soient sagement gardez.* [v] *Vide Portescue* of this matter. And see the *Mirror*, that in some cases the party convicted had forty dayes, or at least thirty dayes to shew some matter to disturbe (that is, to arrest) judgement, which now I know is gone *in desuetudinem*, and great expedition is now made in pleas of the crowne concerning the life of man. *Sed de morte hominis nulla est cunctatio longa.*

[v] Portescue in  
libro de Laudibus  
Legum Anglie.  
*Mirror*, ch. 4. Sec. 3.  
Supt. chency distour-  
banz jugement  
mortels.

[u] 2. Geo. 114. b.  
Zouch's case.  
(2 Inst. 582.)

[s] And the use of the king's bench at this day is, that if the offence be committed in another county than where the bench sits, and the inditement be removed by *certiorari*, there must be fifteene dayes betweene every process and the returne thereof; but if it be committed in the same county where the bench sit, they may proceed *de die in diem*; but so they will doe rarely. But let us returne againe to the common pleas.

[a] Ards. super  
Cart. ubi supra.  
7. R. 2. 177. a.  
11. Am. 30.  
12. Am. 4.  
22. Am. 79. 3 R. 2.  
22. Am. 9 R. 2. 4. 5. 6.  
27 R. 2. 1.  
2 W. 1. cap. ult.  
[v] 7. R. 2. 177.  
D. 7. Ap. 7.  
14. Am. 4.  
24 R. 2. 31.  
29 R. 2. 30.  
9 R. 2. 18.  
12 R. 2. 12.  
9 R. 2. Error 67.  
22 R. 2. 15.

Secondly, there is a day called *dies specialis*; [u] as in an assise in the king's bench or common pleas, the attachment need not be 15 dayes before the appearance. Otherwise it is before justices assigned. But generally, in assises, the judges may give a speciall day at their pleasure, and are not bound to the common dayes; [\*] and these daies they may give as well out of terme as within. So upon an imparlance the court may give any speciall or particular dry, but that must be in the terme time; and likewise in a *scire facias*, upon a fine or a recovery in a reall action, because it is a writ of execution; and so it is in a *per que servitia* and the like, and in all judiciall writs: in process against an infant to judge of his age, or where the husband prayeth in ayd of his wife, or in a *habeas* at the suit of the defendant, there need not be fifteene dayes. Also after demurrer in law, the court may give what day they will.

[b] 41 R. 2. Zouch's  
case. 4. 1 R. 2. 4.  
27. Am. 33.

[b] And it is worthy the noting, that if in an assise the parties be adjourned to *Westm. usque 15 Pasche*, there they be not demandable till the fourth day; but if it be adjourned *usque diem Lune*, or *diem Martis*, there the parties are demandable on that day.

[c] 3 R. 2. Avoerie  
120. 15 R. 2. Jour.  
20. 22 R. 2. 20.  
1 R. 2. 4.  
9. Co. 40.  
Comme de Salep's  
case. 53 R. 2. 45.

Thirdly, [c] there is a day of grace, *dies gratie*, or a day of courtesie. The name doth shew of what kind it is; and regularly this day is granted by the court, at the prayer of the demandant or plaintife in whose delay it is, and never at the prayer of [135. a.] tenant or defendant. But it is worthy of observation,

[d] 24 R. 2. Jour 24.  
12 R. 2. 21. 21.  
20 R. 2. 9.  
27 R. 2. 24.  
[e] 20 R. 2. 1.  
Jour 20. 12 R. 2.  
124. 20 R. 2. 20.  
9. Am. 51.  
21 R. 2. 12.  
47 R. 2. 12. 10.  
22 R. 2. 42.  
24 R. 2. 27.  
29 R. 2. 200.  
20 R. 2. 19.  
24 R. 2. 20.  
24 R. 2. Breve 200.  
Breve. 17. 5.  
fol. 207.  
[f] 21 R. 2. 42.  
3 R. 2. 2. a.  
20 R. 2. 20.

[d] that a day of grace is never granted, where the king is party by aide prayer of the tenant or defendant; nor where any lord of parliament or peere of the realme is tenant or defendant. [e] And sometimes the day that is *quarto die post*, is called *dies gratie*; for the very day of returne is the day in law, and to that day the judgement hath relation; but no default shall be recorded till the fourth day be past, unless it be in a writ of right, where the law alloweth no day, but only the day of returne. This day is sometimes called *ides amoris*, and sometimes a *dies datus*. But it were too long to enumerate all. This shall be sufficient to give the reader a taste to understand the residue concerning this matter.

[f] There is also a day of appearance in court by the writ, and by the roll. By writ, when the sherife returns the writ. By the roll,

roll, when he hath a day by the roll, and the sherife returnes not the writ, there the defendand, to save himselfe from corporall paine, as by imprisonment, or to prevent the losse of issues, or to save his freehold or inheritance, may appeare by the day he hath by the roll.

[g] Note, it is said commonly, that the day of *nisi prius*, and the day in bank, is all one day. That is to be understood as to pleading, but not to other purposes.

There are *dies juridici* (which [h] *Briston* calleth *temple covenables*) and *dies non juridici*. *Dies juridici* (except it be in assises) are only in the tearme. [i] And there be also in the tearme *dies non juridici*. As in all the foure tearmes the sabbath day is not *dies juridicus*, for that ought to be consecrated to divine service. (1) Also in *Michaelmasse* tearme the feasts of *All Saints* and of *All Soules*; (2) in *Hillarie* tearme the *Purification of the Blessed Virgin Marie*; and in *Easter* tearme the feast of the *Ascension* are not *dies juridici*, but set apart by the ancient judges and sages of the law for divine service. As for *Trinity* tearme, it sometimes had seven dayes of returne, and was as long as *Michaelmasse* tearme is now: but for avoiding of infection in that hot time of the yeare, and that men might not be letted to gather in harvest, three returnes (since *Littleton* wrote) viz. *Crastino Sancti Johannis Baptistae*, *Octabis Sancti Johannis Baptistae*, and *15 Sancti Johannis Baptistae*, are by the statute of 32 H. 8. cut off, and become *dies non juridici*. And in those dayes the feast of *Saint John the Baptist* was not *dies juridicus*. And the said statute, called *Dies Communis in Banco*, is in divers points (since *Littleton* wrote) altered, as by the said statute appeareth. And in ancient time respect and reverence was had by law to certaine times, as it appeareth [k] by the statute of W. 1. cap. 51. which hath a short but an excellent preamble; viz. *Et pur ceo que grand charitie eerra de faire droit a tous en tout temps, ou mestior serroit; purveu est per assentment des prelates, que assises de novel disceiun, mortdauncester, et darreine presentment, fuissent prises en le Advent, en Septuagesime, et en Quaresme, auxibien come (le home) prent lenquestes: et ceo pria le roy as eveques.*

[l] This statute is expounded in bookes, which I have onely added, to the end the studious reader might understand the bookes, that darkly speake of this matter, and be ignorant of nothing that belongs to the understanding of any part of the law. Now *Advent* is a moneth before the feast of the *Nativity of our Saviour Christ*, so-called *de adventu Domini in carne*. *Septuagesima* beginneth ever on the sabbath day, and is the third sabbath before *Shrove Sunday*, so-called, because it is the seventieth day before the feast of *Easter*. *Sexagesima* is the second Sabbath before *Shrove Sunday*, so named, because it is the sixtieth day before *Easter*; and so of *Quinquagesima* and *Quadragesima*, [m] whereof you shall reade in acts of parliament, and ancient authors. (3) Now as there be *dies juridici*, so there be *hora convenientes*, whereof the *Mirror* saith, [n] *abuson, que len tient pleas per dimanches (id est sabbaths) ou per auters jours defendus, ou devant le soleil levy, ou noctantre, ou en dishoneqst lieu.*

Furthermore,

3 E. 4. 15. 4 E. 4.  
7 E. 4. 15.  
8 E. 4. 15.  
3 H. 7. 2.  
10 H. 7. 14. b.  
27 H. 8. 14.  
11. Co. 40.  
17 E. 3. 2.  
11 Elix. Dier 206.  
[g] 21 E. 6. 10. 20.  
4 H. 6. 9.  
40 E. 3. 31.  
(Gro. Jam. 644.)  
[h] *Briston*, fol. 134. a.  
[i] Inst. 204.  
[j] *Mirror*, cap. 3. sect. *Exception de Temps*, & cap. 4. sect. 1.  
(*Plowd.* 205.  
Cro. Cha. 602.  
Cro. Elix. 237.)

22 H. 8. cap. 11.

[k] W. 1. cap. ultimo.

[l] 7. Am. p. 7.  
14. Ass. 8.  
Y. M. B. 177, &c.  
*Briston*, fol. 134. b.

[m] W. 1. cap. 51. *Sabbatum*  
3 E. 1. *Briston*, fol. 134. ca. 52.  
[n] *Mirror*, lib. 5. sect. 1.

(1) [See Note 218.]

(2) [See Note 219.]

(3) See further, as to *dies non juridici*,

[p] Bract. lib. 4.  
fol. 364.  
Britton, fol. 200.  
(Co. Edm. 43.  
1 Bract. 364.)

[o] Furthermore, there are (as ancient authors term them) *dies solaris et dies lunaris, secundum quod Deus divisit lumen à tenebris, ex quibus duobus diebus efficitur unus dies, qui dicitur artificialis, ex die precedente et nocte subsequente, qui constat ex 24 horis.*

Gen. chap. 1.  
ver. 4, 5.

But we at this day, retaining the same method, doe differ in words. For we say, *dierum alii sunt naturales, alii artificiales; dies naturalis constat ex 24 horis, et continet diem solarem et noctem: and therefore in indictments of burglary, and the like, we say, in nocte ejusdem diei. Iste dies naturalis est spatium, in quo sol progreditur ab oriente in occidentem, et ab occidente iterum in orientem. Dies artificialis sive solaris incipit in ortu solis, et desinit in occasu: and of this day the law of England takes hold in many cases. Now divers nations beginne the day at divers times. The Jewes, the Chaldeans, and Babylonians, beginne the day at the rising of the sunne; the Athenians at the fall; the Umbri in Italy beginne at midday; the Egyptians and Romans from midnight; and so doth the law of England in many cases. Of all which you shall reade plentifull matter in our bookes, and in my Reports, which by this short instruction you shall the better understand.*

[p] Bract. lib. 2.  
fol. 364.  
Britton, fol. 200. a.

[h] There is also *annus minor* and *major*. The lesser yeare consisteth of 365 dayes and sixe houres, whereby in every fourth yeare there is *dies excrecens*, which makes that yeare to have in rei veritate 366 daies, and that is called *annus major*. [135. b.]

[q] 17 Edm.  
Dier 348.  
(2. Ro. Abr. 231.)  
[r] 21 E. 3.  
stat. de annu  
biogredii.

[q] A quarter of a year containeth by legall computation 91 dayes, and half a yeare containeth 182 dayes; for the odde hours in legall computation are rejected; and by [r] the statute *de anno bissextili*, it is provided, *quod computentur dies ille excrecens et dies proxime præcedens pro unico die*, so as in computation that day excrecent is not accounted. A month, *mensis*, is regularly accounted in law 28 dayes, and not according to the solar month, nor according to the kalendar [s], unlesse it be for the account of the laps in a *quare impledi*. There is *mensis solaris*, and *mensis lunaris*. *Solaris est 12 pars anni, viz. spatium 30 dierum horarum 10 et minutorum 30, et lunaris est spatium 28 dierum.*

[s] 2. Co. 43.  
Cambridge's case.  
(2. Ro. Abr.  
231. Cro. Jac.  
167.)

"*Resummons ou re-attachement.*" These are writs that the demandant or plaintife, after he hath obtained his letters of absolution, may sue out to bring the tenant or defendant againe into court to have day, to make answer unto him. [t] And these writs doe lye in all cases when the plea is discontinued or put without day, either in this case, or in case when the demandant or tenant hath his age, or for the *non venue* of the justices, or in case of a protection, or *essoine de service le roy, &c.* Of these writs there be two sorts, viz. generall and speciall, whereof you may see presidents, and reade more at large in the case of discontinuance of processe in my Reports, and need not here to be inserted.

[t] Bract. lib. 2.  
fol. 432.  
Britton, ca. 74.  
7. Co. 20, 30.  
(Part. 363. a.)

But in the case  
of outlawry the  
writ shall abate  
if he obtains  
not his pardon.  
44 E. 6. 27.

"*Sur son original.*" This is intended of his originall writs, or of that which is instead of an originall writ. But note, that in the other five cases the writ shall abate; and in the case of excommungement the writ shall not abate, but the plea to be put without day untill the plaintife purchase his letters of absolution, and sue out his resummons, or reattachement.

In ancient times more persons seemed to be disabled then these ~~are~~ recited by *Littleton*. As first, he that was a leper, and by the  
writ



writ de leproso amovendo was *propter contagionem morbi prædicti* (as the writ saith) *et propter corporis deformitatem* (as others say) to be removed from the society of men to some solitary place; and thereupon [u] it is said, *datur etiam exceptio tenenti ex personâ petentis heremptoria propter morbum petentis incurabilem et corporis deformitatem; ut si petens leprosus fuerit, et tam deformis quoddam aspectus ejus sustineri non possit, et ita quoddam à communione gentium sit separatus, talis quidem placitare non potest, nec hereditatem petere.* [x] And herewith Britton agreeth. Treating of disabled men, as men outlawed, abjured the realme, attainted of felony, &c. he addeth, *ne mescl, ouste de common gentz.*

[y] And Fleta saith, *competit etiam ei exceptio propter lepram manifestam, ut si petens leprosus fuerit, et tam deformis quoddam à communione gentium merito debet separari; talis enim morbus petentem repellit ab agendo.*

And if these ancient writers be understood of an appearance in person, I think their opinions are good law; for they ought not to sue nor defend in proper person, but by attorney; for they are separated à communione gentium propter contagionem morbi et deformitatem corporis.

Before the Conquest this disease was not known in England; for master Camden, writing of Burton Lazars in Leicestershire, saith, [a] *primis Normannorum temporibus collecta per Angliam stipite nosocomium hoc constructum ferunt, quo tempore lepra (quæ à nonnullis elephantiasis) gravissimè vi contagionis per Angliam serpsit.* And it is called *morbus elephantiasis*, because the skinnies of lepers are like to elephants. [b] And the law of England, for the removing of the lepers from the society of men to some solitary place, is grounded upon God's law.

[c] Also there was a time when ideots, madmen, and such as were deafe and dumbe naturally, were disabled to sue, because they wanted reason and understanding (*tales enim non multùm distant à brutis*). But at this day they all may sue; for the suit must be in their name, but it shall be followed by others. [d] And note, that when an ideot doth sue or defend, he shall not appeare by gardian or prochein amy, or attorney, but hee must bee ever in person; [e] but an infant, or a minor, shall sue by prochein amy, and defend by gardian (1). But now let us heare what Littleton will say unto us.

[u] Bract lib. 2. fol. 431.

[x] Britton fol. 39. & 38.

[y] Fleta, lib. 6. cap. 39.  
22 E. 3. in decret. clau. 20. Part. no. 14. F. N. B. 234. Register.

[a] Camden in Leicestershire, verbo Burton.

[b] Levit. cap. xiii. verse 44, 45, 46. Numer. cap. v. verse 1, 2.  
iv. Regum, c. 18.  
[c] Bract l. 2. 420, 431.  
Britton, c. 39.  
Fleta, l. 6. c. 37.

[d] 33 H. 6. 18.  
F. N. B. 27. G.

[e] 27 H. 2. 11.  
40 E. 3. 16.  
30 E. 4. 2.  
F. N. B. 27 H.  
(2. Inst. 261.)

## Sect. 202.

**I**TEM, si un villein est fait un chapleine seculer, uncore son seignior poit luy seiser come son villein, et seiser ses biens, &c. Mes il semble, que si le villein entre en religion, et est professe, que le seignior ne poit luy prender ne seiser, pur ceo que il est mort en ley; nient pluis que si un frank

**A**LSO, if a villeine be made a secular chaplaine, yet his lord may seise him (2) as his villeinc, and seise his goods, &c. But it seemeth, that if the villeine enter into religion, and is professed, that the lord may not take nor seise him, because he is dead in law; no more than

(1) [See Note 220.]

(2) Vide tamen Pasch. 8 E. 1. rot. 7.

the case of Edward Rowald contra.—H. MSS.

*frank home prent un niece a sa femme, le seignior ne poit prendre ne seiser la femme de le baron, mes son remedy est d'aver un action envers le baron, pur ceo que il prist sa niece a femme sans son licence et volunt, &c. Et issint poit le seignior aver action envers le souverain del meason, que prist et admittast son villedin d'estre professe en mesme le meason, sans licence et la volunt le seignior, et recovra ses damages a la value de le villedin. Car celui que est professe moigne, serra un moigne, et come un moigne serra pris pur terme de sa vie natural, sinon que il soit deraigne per la ley de saint eglise. Et il est tenu per son religion de garder son cloister, &c. Et si le seignior luy puissoit prendre hors de sa meason, donques il ne viveroit come un mort person, ne solongue son religion, le quel serroit inconvenient, &c.*

than if a free man taketh a niece to his wife, the lord cannot take nor seise the wife of the husband, but his remedy is to have an action against the husband, for that he took his niece to wife without his licence and will, &c. And so may the lord have an action against the sovereign of the house, which taketh and admitteth his villeine to be professed in the same house, without the licence and leave of the lord, and he shall recover his damages to the value of the villeine. For he which is professed a monk, shall be a monk, and as a monk shall be taken for terme of his natural life, unlesse he be deraigned by the law of holy church. And he is bound by his religion to keepe his cloyster, &c. And if the lord might take him out of his house, then he should not live as a dead person, nor according to his religion, which should be inconvenient, &c.

[a] Mirror, cap. 5. sect. 18.  
Doct. & Stud.  
fol. 141.  
4 K. 4. 25. per  
Denby. 27. An.  
pl. 40.

“**CHAPLEINE** [a] *seculer*” is he that is *infra sacra ordinis*; but he is not regular, (that is) liveth not under certain rules, nor hath vowed those three things above specified. [136. a.]

[b] Britton, cap. 31. fol. 78.  
Doct. and  
Student, fo. 141.  
(Doct. Plac. 9.  
Ante 133. a.)  
4 H. 4. cap. 14.

[b] “*Enter en religion, et est professe.*” That is intended (as hath been said) when he is regular and profest under certain rules, as to become one of the four orders of friars (that is to say) *freres Minors, Augustines, Preachers, or Carmelites*, or become a monk, canon, or nunne, &c. *Qui ad vivendum regulariter se astringunt, sive sunt monachi, sive canonici regulares sive sanctimoniales.* For all these are regular and votaries, and are dead persons in law; but so are not the secular persons, as prebends, parsons, vicars, &c.

[c] 21 H. 7. 39.  
29 H. 7. 46.  
Bastardy 33.  
5 E. 2. 66.  
Nonability 26.  
47 E. 3. Case ult.  
(12. Co. 9.)  
1. Ro. Abr. 360.)

And therefore it is holden in our bookes, [c] that if a secular priest taketh a wife, and hath issue and dyeth, the issue is lawfull, and shall inherit as heire to his father, &c. for (as it was then holden) the marriage was not void, but voidable by divorce, and after the death of either partie no divorce can be had (1).

But if a man marieth a nunne, or a monk marieth, these marriages were holden void, and the issues bastards; because (as it was then holden) the marriage was utterly voyde, for that the nunne and the monk (as *Littleton* here saith) were dead persons in law. And that is the reason yielded by *Littleton*, wherefore a villeine, being professed in religion, cannot be seised by the lord, because he is dead in law; and yet his blood or bondage is not thereby altered, but his person in respect of his profession only priviledged. [d] *In decretalibus*

[d] Glanvill.  
lib. 5. cap. 2.  
Britton, fo. 79.  
& 82.

*decretalibus statutum est, quod nullus episcopus spurcius aut servos, donec à dominis suis fuerint manumissi, ad sacros ordines promoveri presumat.* But notwithstanding his person is privileged till he be disgraded. And so it is holden in our old bookes. [c] If a vil-

[136. b.] leine be made a knight, for the honour of his degree his person is privileged, and the lord cannot seize him untill he be disgraded. *Nullum vilem personam natione spurium, vel servilis conditionis, ad militie strenuitatis ordinem promoveri licebit; sed cum à dominis suis petantur ut nativi, ipsi primo degradatis, statim ad iudicium procedatur.*

"*Si un frank home prent un niese.*" [f] Some have holden, that by this marriage the wife shall be free for ever; but the better opinion of our bookes is, that shee shall be privileged during the coverture onely, unlesse the lord himselfe marieth his niese; and then some hold, that she shall be free for ever (1).

If a niese be regardant to a mannor, and she taketh a freeman to husband by licence of the lord, and the lord maketh a feoffment in fee of the mannor, the husband dieth, the feoffee shall not have the niese, but the feoffor, for that during the marriage she was severed from the mannor. And so is the booke 29. *Ass.* (which is falsly printed) to be understood.

[g] If two coparceners be of a villeine, and one of them taketh him to husband, she and her husband shall not have a *nupter obit* against her coparcener, but after the decease of her husband she shall.

"[h] *Mes son remede est d'aver un action vers le baron, &c.*" Albeit marriage is lawfull, yet when it worketh a prejudice to a third person, an action in this case lyeth against the husband to the value of his losse. And albeit he did not know her to be a niese, yet the action lyeth against him; for he must take notice thereof at his perill, [f] unlesse she be out of the service of the lord, and vagrant; and then if one not knowing her to be a niese marieth her, some say, that in that case no action lyeth against the husband. [k] And likewise the lord shall have an action against those that were the meanes to make the villeine a knight.

"*Sovereigne, praprius, chief;* as here, *sovereigne del meason,* is the chiefe of the house.

"*Sinen que il soit deraigne.*" This word (*deraigne*) commeth of the French word *derayer*, or *deraigner*, that is to say, to displace or to turne one out of his order; and hereof cometh *deraignment*, a displacing or turning out of his order. So when a monke is deraigned, he is degraded and turned out of his order of religion, and become a lay man.

"*Le quel serroit inconvenient.*" *Ab inconvenienti* is a good argument in law, as *Littleton* often observeth. And here *Littleton* concludeth, that the lord cannot take a monke out of his house, for that it should be inconvenient, which *Littleton* here sheweth, for divers

[c] Fleta, lib. 2. cap. 44. Britton, ubi supra.

[f] F. N. B. 72. b. 33 E. 1. tit. Villain 40. 33 E. 3. Rid. 31. (Post. 137. b.) 19 E. 2. Rid. 30. 44 E. 3. 6. 4 E. 4. 24. 1 H. 4. 6. 13 E. 1. Villain 40. 18 Ass. 10. Doct. & Stud. 141 Mirror, c. 2 sect. 18. ass.

[g] 15 H. 3. nupter obit 17. 3 H. 3. Broke 707.

[h] Vide Britton, tit. 32. Fortesc. c. 43. 40 E. 3. 6. a.

[i] 7 R. 2. tit. Barre 240. (F. N. B. 102. b. 1 Leon. 240. [k] Britton, fol. 82. b.

31 H. 6. ca. 5. 12 H. 7. c. 7. 11 H. 4. 4. b.

31 H. 2. cap. 20.

40 Ass. 27. Finchden.

(1) See ante 123. n. 3. Post. 137. b.

divers reasons, and therefore unlawfull. And the inconvenience is, that where a man of religion should live according to his profession in religion, by the taking of him out he should not.

“*Si le seignior luy püssoit, prendre, &c.*” By this it appeareth, that if a man detaineth a villeine in his house, the lord of the villeine may take him out of the house; for here the impediment, wherefore the lord could not take him out of the house, was, for that the villeine was a monke professed. And so in case of the wardship here next following.

## Sect. 203.

**E**N meisme le manner est, si soit gardeine en chivalrie de corps et de terre d'un enfant deins age, si l'enfant, quant il vient al age de 14 ans, entra en religion, et est professe, le gardein n'ad auter remedy (quant a le garde de le corps) forsque breve de ravishment de garde envers le souveraigne de le meason. Et si ascun esteant de plein age, que est cosin et heire del enfant, enter en le terre, le gardein n'ad ascun remedie quant al garde de la terre, pur ceo que l'entrie del heire l'enfant est congeable en tiel case.

**I**N the same manner it is, if there be a gardeine in chivalry of the body and land of an infant within age, if the infant, when he comes to the age of 14 yeares, entreth into religion, and is profest, the gardian hath no other remedy (as to the wardship of the body) but a writ of ravishment de gard against the sovereign of the house. And if any being of full age, who is cousin and heire of the infant, entreth into the land, the gardian hath no remedy as to the wardship of the land, for that the entry of the heire of the infant is lawfull in such case.

“**B**RIEFE de ravishment de garde.” This writ is given by the statute of *W. 2. cap. 35. in verbis conceptis*; the words of which writ be, that the defendand, *talem heredem, cujus maritagium ad ipsum A. pertinet, &c. rapuit et abduxit, &c. contra pacem*. Now *rapere* signifieth properly to take [137. a.] away by violence and force. And when the sovereign took and admitted the ward into his house to be professed, this in judgement of law is a ravishment of the ward; and as it appeareth in our bookes before the said statute, there lay a general action of trespas in that case.

9 Co. Doctor  
Hussey's case,  
fol. 72.

“*Après l'age de 14 ans, &c.*” Our author mentioneth this age, because it is prohibited by the statute of *4 H. 4.* that no childe shall be received into any house of religion before that age without consent of his parents and gardians, &c.

“*Le gardein n'ad ascun remedie, &c.*” Here it appeareth, that, by the profession of the ward, the lord loseth the wardship of the land, because he is *civiliter mortuus*, a dead man in law, and cannot hold any inheritance; neither can the gardian continue the wardship of the land, because by the civil death of the ward the inheritance is descended to another, who is either to be in ward, or pay relieve. So as in this case the gardian hath *damnum*, but it is *abague*

4 H. 4. cap. 17.

*absque injuria*, because he loseth the wardship of the land by act of law, viz. the descent thereof to another; and therefore the law giveth to him no remedy in this case, neither by any formed writ, nor by action upon his case; for *Littleton's* words are generall (he hath not any remedy.)

(*Nov. 124. 1 Re. Abr. 107. Post. 197. b.*)

## Sect. 204.

**I**TEM, en maults et divers cases le seignior poit faire manumission et enfranchisement a son villedin. Manumission est properment, quant le seignior fait un fait a son villedin de lay enfranchiser per hoc verbum (manumittere), quod idem est quod extra manum vel extra potestatem alterius ponere. Et pur ceo que por tiel fait le villedin est mis hors de la main et de la poier son seignior, il est appellé manumission. Et totint chescun maner de enfranchisement fait a un villedin poest estre dit manumission.

**A**LSO, in many and divers cases the lord may make manumission and enfranchisement to his villeine. Manumission is properly, when the lord makes a deed to his villeine to enfranchise him by this word (manumittere), which is the same as to put him out of the hands and power of another. And for that that by such deed the villeine is put out of the hands and out of the power of his lord, it is called manumission. And so every maner of infranchisement made to a villein may be said to be a manumission.

**"MANUMISSION,"** [1] *Manumittere, quod idem est quod extra manum vel potestatem ponere.*

*Quia quamdiu quis in servitute est, sub manu et potestate domini sui est.*

*Qui in potestate domini sui est, in manu domini sui esse dicitur; sed postquam manumissus est, ab illo liberabitur, ergo dicitur quasi extra manum, id est, extra potestatem domini sui missus.* And here is to be noted (as in many other places is observed) what regard *Littleton* hath to the true etymologies of words.

[1] *Glanvill. lib. 4. cap. 4. Britton, fol. 76. Sec. 82, 97, 110. Fleta, lib. 3. cap. 13. & lib. 2. cap. 44.*

**"[m] Enfranchisement."** (Hereby *Littleton* explaineth manumission). It is derived from the *French* word *franchise*, [137. b.] that is, liberty; and in the common law it hath divers significations: sometimes the incorporating of a man to bee free of a company or body politique, as a free man of a city, or burgesse of a burrough, &c. sometimes to make an alien a denizen; and here to manumise a villeine or bondman. So as this word (*enfranchisement*) is more general than *manumission*; for that is properly applied to a villein; and therefore every *manumission* is an *infranchisement*, but every *infranchisement* is not a *manumission*. [n] There be two kindes of manumissions, one *expresse*, and the other *implied*. *Expresse*, when the villeine by deed in *expresse* words is manumised and made free. The other *implied*, by doing some act that maketh in judgement of law the villein free, albeit there be no *expresse* words of manumission or *enfranchisement*. [o] If a villein be manumised, albeit he become ingratefull to the lord in the highest degree, yet the manumission remains good: and herein the common law differeth from the civill law,

[m] *Mirror, ch. 2 sect. 18.*

[n] *Mirror, cap. 2 sect. 18.*

[o] *Fortescue, cap. 44.*

for

*for libertinum ingratum leges civiles in pristinam redigunt servitutem, sed leges Angliæ semel manumissum semper liberum judicant, gratum et ingratum.*

There be also some cases where the villein shall be privileged from the seisure of the lord, albeit he be not absolutely manumised or enfranchised. Sometimes *ratione loci*: [h] as if a villeine remaine in the ancient demeane of the king a yeare and a day without claime or seisure of the lord, the lord cannot have a writ of *nativo habendo*, or seise him, so long as he remaines and continues there; and the reason of this was, in respect of the service he did to the king in plowing and tillage of the demeane, and other labours of husbandry for the king's benefit. And herewith agree old bookes, [g] which say, that this immunity was sometimes granted by common consent to the king for his profit, and for the help or ease of his villeins. [r] If a villein be a priest of the king's chappel, the lord cannot seise him in the presence of the king, for the king's presence is a privilege and protection for him. Sometimes *ratione professionis*; [s] as if a villeine be professed a monke, or a niese a nun, as hath been sayd. [t] Sometimes (as some have said) *ratione dignitatis*; as if the villeine be made a knight, &c. Sometimes *ratione matrimonii*; as if a niese marry a free man, she is privileged during the marriage, but not absolutely enfranchised; for if her husband dye, she is niese againe, unlesse the lord himself marrieth the niese, and then she is enfranchised for ever, as hath been said before. (1) And it shall not be amisse to observe the wisdom of our ancients, with what solemnity (for more surety thereof) manumissions were made. *Qui servum suum liberat, in ecclesiâ, vel mercato, vel comitatu, vel hundredo, coram testibus et palam faciat et liberas ei vias, et portas conscribat apertas, et lanceum et gladium, vel quæ liberorum arma, in manibus ei ponat.* Our author having spoken of an expresse manumission, here followe enfranchisements in law.

[g] 89 B. 3. c. 1.  
F. N. B. 79. a.  
(Dy. 266. b.  
283. b.)

[g] Glauvill. lib.  
1. cap. 6.  
Fleta, lib. 2. cap.  
44. Brit. fol. 79.  
Miles, cap. 2.  
sect. 14.  
(3 Ro. Abr.  
734, 737.)  
[r] 27 Ass. p. 49.  
[s] Glauvill. lib.  
1. c. 8.  
[t] Britton, ubi  
supra.  
(Ante 126. b.)

Lib. Rub. cap. 71.

## Sect. 205.

**A**UXI, si le seignior fait a son villeine un obligation de certaine somme d'argent, ou grante a luy per son fait un annuity, ou lessa a luy per son fait terres ou tenements pur terme des ans, le villeine est enfranchise.

(3 Co. 56. a.)

[u] 20 E. 3. 66.  
vil. 28.  
31 E. 7. 12.

**A**LSO, if the lord maketh to his villeine an obligation of a certaine sum of money, or granteth to him by his deed an annuity, or lets to him by his deed lands or tenements for terme of yeares, the villeine is enfranchised.

**F**OR when the lord enableth the villeine to have an action against him, as for debt or annuity, &c. or giveth to the villeine a certaine and fixed estate in lands, tenements, or hereditaments, as a lease for yeares, this amounteth to an enfranchisement, not onely during the yeares, but for ever; [u] and albeit the lease be made to the villeine without deed, yet it is an enfranchisement for ever.

(1) Ante 123. a. n. 3.

[138. a.]

## Sect. 206.

**AUXY**, si le seignior fait un feoffment a son villeine d'ascun terres ou tenements, per fait ou sans fait, en fee simple, fee taile, ou per terme de vie ou ans (1), et a luy livra scisin, ceo est un enfranchisement.

**ALSO**, if the lord maketh a feoffment to his villeine of any lands or tenements, by deed or without deed, in fee simple, fee taile, or for terme of life or yeares, and delivereth to him seisin, this is an enfranchisement.

This is evident, and agreeth with our bookes.

Vol. 24 E. 4. 22.  
13 H. 3. 41.  
Vill. 42.

## Sect. 207.

**MES** si le seignior fait a luy un lease des terres ou tenements, a tener a volunt le seignior, per fait ou sauns fait, ceo n'est ascun enfranchisement; pur ceo que il n'ad ascun manner de certainty ne suertie de son estate, mes le seignior luy poit ouster quant il voilet.

**BUT** if the lord maketh to him a lease of lands or tenements, to hold at will of the lord, by deed or without deed, this is no enfranchisement; for that he hath no manner of certainty or surety of his estate, but the lord may oust him when he will.

**"PER fait."** So as a deed made to a villeine by the lord is no enfranchisement, when the deed transferreth no certaine or fixed estate, but revocable at the lord's will. If the lord release to his villeine all the right in *Black Acre*, and the villeine is not thereof seised, this is no enfranchisement, because it is voyd, and can give no cause of action. If the lord attorneth to his villeine, this is no enfranchisement.

11 E. 7.

## Sect. 208.

**AUXY**, si le seignior suist envers son villein un præcipe quod reddat, s'il recover, ou soit nonsue apres appearance, ceo est un manumission, pur ceo que il puissoit loyalment enter en la terre sans tiel suit. En mesme le manner est, s'il suist envers son villeine un action de debt ou d'account, ou de covenant, ou de trespasse, ou de hujusmodi, ceo est un enfranchisement, pur ceo que il puissoit emprison

**ALSO**, if the lord sueth against his villeine a præcipe quod reddat, if he recover, or be nonsuite after appearance, this is a manumission, for that he might lawfully have entered into the land without suit. In the same manner it is, if he sue against his villeine an action of debt or account, or of covenant, or of trespasse, or of such like, this is an enfranchisement, for that he might imprison

(1) The words *ou ans* not in L. and M. Roh. nor P. They first appear in Redm.

*emprison le villain, et prendre ses biens sans tiel suit. Mes si le seignior suist son villeine per appeale de felony, ou il fuit endict de ceo devant, (1) ceo ne enfranchisera pas le villeine, coment que le matter de l'appeale soit trove encounter le seignior, pur ceo que le seignior ne puisse aver le villain d'estre pendue sans tiel suit. Mes si le villeine ne (2) fuit endict de mesme le felonie devant l'appeale sue envers luy, et puis est acquite de cest felony, iastut que il recouvrera damages envers son seignior pur le faux appeale, donques le villeine est enfranchise, pur le cause de le jugement de damages a luy d'estre donec envers son seignior. Et plusors autres cases et matters y sont, per quous un villain peut estre enfranchise envers son seignior, &c. Sed de illis querere (3).*

*imprison the villeine, and take his goods without such suite. But if the lord sue his villeine by appeale of felonie, where he was indited of the same before, this shall not enfranchise the villeine, albeit that the matter of appeale be found against the lord, for that the lord could not have the villeine to be hanged without such suit. But if the villeine were not indited of the same felonie before the appeal sued against him, and afterward is acquitted of this felony, so as he recover damages against his lord for the false appeale, then the villeine is enfranchised, because of the judgment of damages to be given unto him against his lord. And many other cases and matters there be, by which a villeine may be enfranchised against his lord, &c. But enquire of them.*

*"SI seignior suist envers son villeine un präcipe quod reddat, &c. ceo est un manumission."* And the principall reason hereof is, for that by this suit he enableth the villeine to be a person able to render him the land by course of law, where the lord without any such suit might have entred. [a] But if the tenant in taile be of a manor whereunto a villeine is regardant, and enfeofeth the villein of the manor, and dyeth, the issue shall have a *formedon* against the villeine, and after the recovery of the manor he shall seise the villein. And the reason is, for that he could [138. b.] not seise the villeine till hee had recovered the manor, which was the principall, and at the time of the writ brought he was no villeine.

The tenant infeoffes the villeine of the lord and an estranger upon collusion: in this case, although the lord may enter upon the villeine for the motty, yet may he have a writ of ward against them both without enfranchisement of the villeine; for if the lord should enter upon the villeine, then should his seigniorie be suspended, and then could not he have a writ of ward against the other.

The lord, upon a writ of covenant brought by the villeine, levies a fine to his villeine of land which is ancient demeane; the lord of whom the land is holden reverseth the fine in a writ of deceit; albeit the authority and jurisdiction of the court is disproved, and that the lord of the villeine shall bee restored to the land given by the fine, yet is it an enfranchisement, for that he answered to the writ of covenant, and the fine was voydable, and not voyde; and therefore, being once an enfranchisement, it cannot be avoided by the reversing of the fine.

*"Soit*

(1) *Ou il fuit endict de ceo devant* in Red. M. nor P.  
but not in L. and M. Rob. nor P.

(2) *ne in Rob. and Red.* but not in L. and

(3) *de illis querere* not in L. and M. nor Rob.

[a] 24 E. 2.  
Descent. 16.  
Vid. Berton, 72.  
Et 136.

(Ante 128. b.  
3 Ro. Rep. 402.)



"*Spit nonsue (id est) non est prosecutus breve suum.*" For by the law the plaintife is first agent at every continuance; and therefore the record sayth, *quod petens seu querens (naming them) obtulit se*, who if he bee called, and make default, then he is said to be nonsuit, *id est, non est prosecutus, &c.*

By Littleton here it appeareth, that there is a nonsuite before appearance at the returne of the writ, or after appearance at some day of continuance. [x] The difference between a nonsuit and a retraxit on the part of the demandant or plaintife is this. A nonsuite is ever upon a demand made, when the demandant or plaintife should appeare, and he makes a default. A retraxit is ever

- [139. a.] when the demandant or plaintife is present in court (as he given over, unless it be when a verdict is to be given, for then he is demandable.) And this is in two sorts, one privative and the other positive. Privative, as upon demand made, that he make default, and depart in despite of the court; and then the entry is, [y] *et postea eodem die revenit ad barram predict' tenens, et pred' petens tunc solemniter exactus non venit, sed à sectâ suâ predictâ in contemptum curiæ se retraxit, ideo consideratum est, &c.* Positive, as when the entry is, *et super hoc idem querens dicit, quod ipse non vult ulterius placitum suum predictum prosecui, sed abinde omnino se retraxit, ideo, &c.* Another form thereof is, *quod idem querens fatetur se (seu cognovit se) ulterius nolle prosecui versus predict' defend', &c. de placito predicto.* [z] A departure in despite of the court is on the part of the tenant, and is, when the tenant or defendant after appearance and being present in court upon demand makes departure in despite of the court, and then the entry is, *et predict' tenens seu defendens licet solemniter exactus non revenit, sed in contemptum curiæ recessit et defaultam fecit, ideo, &c.* It is called a retraxit, because that word is the effectual word used in the entry, as before it appeareth, and it is ever on the part of the demandant or plaintife. [a] Another difference between a retraxit and a nonsuit is, that a retraxit is a barre of all other actions of like or inferior nature: *qui semel actionem renunciavit, amplius repte non potest.* But regularly a nonsuit is not so, but that he may commence an action of like nature, &c. againe. For it may be, that he hath mistaken somewhat in that action, or was not provided of his proofes, or mistaking the day, or the like. But yet for some special reasons, nonsuit in some actions is peremptory.

In a *quare impedit*, if the plaintife be nonsuite after appearance, the defendant shall make a title, and have a writ to the bishop; [b] and this is peremptory to the plaintife, and is a good barre in another *quare impedit* (1); and the reason is, for that the defendant had by judgement of the court a writ to the bishop, and the incumbent, that commeth in by that writ, shall never be removed, which is a flat barre as to that presentation; and of this opinion is Littleton in our booke. And the same law, and for the same reason, it is in the case upon a discontinuance.

[c] In a writ *de nativo habendo*, nonsuit after appearance is peremptory; for thereby the villeine is enfranchised. And so it is if two be plaintifes in a *nativo habendo*, if one be nonsuit, this is the nonsuit of both, and no summons and severance doth lie in that

case,

[x] 5 Co. 86. 62.  
Hecher's case.  
3 H. 4. 13.  
Brooke vs.  
Nonsuit 1.  
8 H. 4. 7.  
20 E. 3. 18.

[y] Tr. 5 H. 6.  
Not. 320. in  
Com. Banco.

[z] F. N. B.  
78. f. 108. d.  
19 E. 2.  
Villain 31.

[a] 5 Co. ubi supra.

[b] 5 E. 3. 86.  
3 H. 4.  
31 E. 4. 15.  
23 H. 6. 44. 46.  
33 E. 6. 1. 55.  
19 E. 4. 9.  
21 E. 4. 2. b. 80.  
F. N. B. 33. b.  
7 Co. 27. b.  
Sir Hugh Per-  
man's case.  
[c] 6 E. 2. Vill.  
26. 13 E. 2. ibid.  
28. 19 E. 2.  
ibid. 31.  
F. N. B. 78. c.  
4 E. 2. Nonsuit  
29.

(1) [See Note 221.]

case, albeit it be a reall action. And this is, *in favorem libertatis*; for in a *libertate probanda* nonsuit after appearance is not peremptory, neither is the nonsuit of the one the nonsuit of both.

[d] Nonsuit in an appeale of murder, rape, robbery, &c. after appearance is peremptory; and this is *in favorem vite*; for if the defendant be acquitted, and take out processe upon the statute of W. 2. against the abettors, or if he purchase his originall writ, for that cause he may be nonsuit.

[e] If the plaintife in an appeale of mayhem be nonsuit after appearance, it is peremptory; for the writ saith, *felonice maihemavit*, and therefore the nonsuit is peremptory.

[f] In an attaint, if the plaintife after appearance be nonsuit, it is peremptory; and the reason is, for the faith that the law gives to the verdict, and for the terrible and fearefull judgement that should be given against the first jury if they should be convicted; and therefore upon the nonsuit, the plaintife shall be imprisoned, and his pledges amerced. But if the processe in an attaint be discontinued, the plaintife may have another writ of attaint, because upon the nonsuit there is a judgement given, but not upon the discontinuance. *Note*, it is truly said, that *exceptio probat regulam*; for these cases excepted stand upon their special and particular reasons, and fall not within the generall reason of the rule. It is a general rule, that nonsuite before appearance is not peremptory in any case, for that a stranger may purchase a writ in the name of him that hath cause of action, as shall be said hereafter in this Section.

[g] In reall or mixt actions the nonsuit of one demandant is not the nonsuit of both, but he that makes default shall be summoned and served; but regularly in personall actions, the nonsuit of the one is the nonsuit of both, unless it be in certain particular cases.

[h] In personall actions brought by executors there shall be summons and severance, because the best shall be taken for the benefit of the dead. And so it is in an action of trespassse, as executors for goods taken out of their owne possession. Like law in account as executors by the receipt of their owne hands.

[i] In an *audita querela* concerning the personalty, the nonsuite of the one is not the nonsuit of the other, because it goeth by the way of discharge and freeing of themselves, and therefore the default of the one shall not hurte the other.

[k] In a *quid juris clamat*, the nonsuit of the one is the nonsuit of both, because the tenant cannot attorne according to the grant.

[l] Some actions follow the nature of those actions whereupon they are grounded; as the writs of error, attaint, *scire facias*, and the like. If a reall action be brought by severall *præcipes* against two or more, if the demandant be nonsuite against one, he is nonsuite against all; for as to the demandant it is but one writ under one *trate*. *Note*, severance is two-fold, viz. by summons *ad sequendum simul*, and that is when one of the demandants or plaintifes never appeared; and by award of the court of nonsuit without any summons, and that is after appearance.

The

[d] 9 H. 4. l. 15. *Kant. Pl.*  
Cor. 140. a. & 171. a. 22. Am.  
97 *Fitz. Cor.*  
184. 22 E. 3. a.  
47 E. 3. 16.  
7 H. 7. j.  
40 E. 3. Dam.  
77. 17 E. 2.  
Coron. 380.  
8 E. 2. Action  
sur *Verdict*. 23.  
[e] 43 Am. 30.  
40 Am. 1.  
[f] 33 Am. 13.  
19 Am. 13.  
30 E. 3. Attaint  
43. 22 E. 3. 7.  
7. N. B. 108. d.

[g] 11 H. 6. 22. 25.  
7. N. B. 34. b.  
10 E. 3. 46.  
Sever. 14.  
5 E. 2. Nonsuit 18.  
10 E. 3. Sev. 16.  
12 E. 3. ib. 23.  
28 E. 3. 9.  
29 H. 6. 45. 38 E. 2. 55. 41 E. 3. Nonsuit 10. 45 E. 3. 10. 2 H. 4. 2. (2 Ro. Abro. 122. 10 Co. 134.)

[h] 43 E. 3. 13.  
48 E. 3. 14.  
28 H. 6. 3.  
11 E. 2. Sev. 26.  
13 E. 3. ib. 18.  
18 E. 3. ib. 28.  
8 E. 3. ibid. 20.  
7 E. 3. 12.  
[i] 18 E. 3.  
Sever. 23.  
6 Co. 25. *Regd.*  
*doct's case.*

[k] 20 E. 3.  
Severance 17.  
[l] 47 E. 3. 6. b.  
47 Am. 3.  
29 Am. 34.  
7 H. 4. 45.  
34 H. 6. 31.  
25 H. 6. 19.  
29 E. 3. 37.  
6 Co. ubi *supra*.  
23 H. 6. 42.  
4 E. 4. 33.  
19 E. 2.  
Nonsuit 32.  
18 E. 3. ibid. 31.  
20 E. 3. ib. 20, 27.  
19 E. 3. ibid. 18.  
3 E. 3. ibid. 17.  
38 E. 3. 9.  
29 H. 6. 45. 44 E. 3. 16. 19 E. 2. Severance 16. (1 *Sid.* 373.)

[m] The king's majesty cannot be nonsuite, because in judgement of law he is ever present in court; but the king's attorney, *qui sequitur pro domino rege*, may enter an *ulterius non vult prosequi*, which hath the effect of a nonsuite. But in an information by an informer, *qui tam*, &c. the informer may be nonsuited.

[n] At the common law, upon every continuance or day given over before judgement; the plaintiff might have been nonsuited; and therefore before the statute of 2 H. 4. after verdict given, if the court gave a day to be advised, at that day the plaintiff was demandable, and therefore might have been nonsuit, which is now remedied by that statute.

[o] But after demurrer in law joyned, if the court doth give a day over, at that day the demandant or plaintiff is demandable, and therefore may be nonsuit, for that is not holpen by any statute.

[p] And after an award to account, the plaintiff may be nonsuit; and so note a diversity between an interlocutory award of the court, and a final judgement (1).

By these few instructions you shall the more easily understand the bookes of tearmes and yeares, and other authorities of law. And here (to returne to *Littleton*) it is to be noted, that, albeit the lord be nonsuit, yet the infranchisement of the villeine doth remaine, for that grew by the appearance to the writ, and cannot be taken away by the nonsuit subsequent. So it is if the writ do abate, yet the infranchisement remaines.

[q] "*Après appearance.*" For otherwise a stranger may purchase a writ in his name; and therefore *Littleton* materially added these words after appearance.

"*Præcipe.*" There be three kindes of *præcipe*. 1. A *præcipe quodd reddat*, whereof *Littleton* here speaketh; 2. a *præcipe quodd permittat*; and 3. a *præcipe quodd faciat*, whereof you may read plentifully in the *Register* and *Fitzherbert's Natura Brevium*, and belongs not properly to this treatise.

"*Account.*" Of this sufficient hath beene said before.

"*Covenant, Conventio.*" Hereof there be two kinds, viz. a covenant personall, and a covenant reall; and a covenant in deed, and a covenant in law.

"*Ou il fuit endite de ceo.*" [r] For if the villeine be not first indited of it, then, upon the acquittall of the villeine, the villeine shall recover damages against the lord by the statute of W. 2. *Quia multi per malitiam*, &c. and consequently shall be enfranchised. But if the villeine be formerly indited of the felony, then though the villeine be acquitted upon the appeale, he shall recover no damages against the lord. For wheresoever the lord giveth to the villeine a just cause of action, he is enfranchised. [s] And therefore if the lord kill his villeine, his sonne and heire shall have an appeale, and thereby his heire shall be enfranchised, because the offence of the lord gave to the heire a just cause of action against the lord.

[m] 6 R. 2. Nonsuit 13.  
24 H. 8.  
Nonsuit Br. 68.  
30 H. 7. 5.  
(2. Ro. Abr. 130, 131.  
Post. 237. b.)

[n] 2 H. 4. ca. 7.  
3 E. 3. 21.  
47 E. 3. 1, 2.  
3 E. 4. f. 11.

[o] 2 H. 5. 5.  
8 R. 2. Nonsuit 34.

[p] 9 H. 7. 1.  
21 E. 3. 32.  
11 Co. 39. 41.  
Metcalfe's case.  
(2. Ro. Abr. 131.  
contra.)

[q] 7 H. 4. 8.  
11 H. 4. 13.  
9 E. 4. 23.  
7 H. 4. 8. a.  
7 H. 7. 6. b.  
8 H. 7. 16.

Vid. Sect. 748.  
4. Co. 80.  
Noke's case.  
F. N. B. 145.

[r] W. 2. cap. 12.  
22. Ass. p. 59.  
33 H. 6. 2.  
14 H. 7. 2.  
40. Ass. 18.  
40 E. 3. 42.

[s] Kelway 134.

(1) [See Note 222.]

## Sect. 209.

**I**TEM, si seignior d'un manor voile prescriber, que il ad este custome deins son manor de temps dont memory ne curt, que chescun tenant deins mesme le manor, que maria sa file a ascun home sans licence de le seignior del manor, ferra fine, (1) et ont fait fine al seignior del manor pur le temps esteant, cest prescription est void. Car nul doit fuire tiels fines forsque tantsolement vilcins. Car chescun franke home poit frankement marier sa file, et que pleist a luy et sa file. Et pur ceo que cest prescription est encounter reason, tiel prescription est voyd.

**A**LSO, if the lord of a manor will prescribe, that there hath beene a custome within his mannour time out of minde of mah, that every tenant within the same manor, who marieth his daughter to any man without licence of the lord of the mannour, shall make fine, and have made fine to the lord of the manor for the time being, this prescription is voyd. For none ought to make such fine but onely villeines. For every free man may freely marry his daughter to whom it pleaseth him and his daughter. And for that this prescription is against reason, such prescription is voyd.

**“QUE il ad este custome, &c.”**

Here some may object, that such a custome may have a lawfull beginning; for *Littleton* in the beginning of this Chapter, Sect. 174. alloweth, that [a] a freeman may take lands of the lord to be holden of him, that is, to pay a fine for the mariage of his sonne or daughter; and therefore [b] some have thought that such a custome generally within the manor should be good. But the answer is, that though it may be so in a particular case upon such a special reservation of such a fine upon a gift of [140. a.] land, yet to claime such a fine, by a generall custome within the manor, is against the freedome of a freeman, that is not bound thereunto by particular tenure. But a custome may be alledged within a manor. [b] That every tenant (albeit his person be free) that holdeth in bondage or by native tenure, the freehold being in the lord, shall pay to the lord, for the mariage of his daughter, without licence, a fine: and it is called *marcett*, as it were a *chete* or fine for marriage (2). And here *Littleton* saith, that none ought to pay such fines but villeines, (that is) either villeines of blood, or freemen holding in villenage or base tenure. So note a diversity betweene a freeholder and a freeman holding in villenage. Villeines use to pay to their lords in acknowledgement of their bondage for their several heads, and thereupon it is called *chevage*, *chevagium*, of the French word *chiefe*, as it were the service of the head. Of which *Bracton* saith, [c] *chevagium dicitur recognitio in signum subjectionis et domini de capite suo*. And sometimes it is written *chivage*, but more properly *chirfage*. [d] *Chevagium* signifieth also a great misprision for any subject to take summes of money, or other

[a] 10 H. 3. 43.  
Roger de Vale's  
case. 13 H. 3.  
Aid. 33.  
[b] 34 H. 6. 15.  
a. per Litt.

[b] 43 E. 3. 1.  
14 H. 6. 15.

[c] Bracton, lib.  
1. cap. 10.  
Britt. fol. 70. b.  
[d] 27. Am. 44.

(1) The words *a le volonte le seignior* are added in L. and M.

(2) See further, as to *marcett*, the word in

Spelm. Gloss. and the Appendix to Robinson on Gavelkind, p. 2.

other gifts yearly in name of *chevage*, because they take upon them to be their chiefe heads or leaders (3).

*"Pur ceo que est prescription est encounter reason, ceo est voyd."*

This containes one of the maxims of the common law, viz. that all customes and prescriptions that be against reason are voyd.

(3. Ro. Abr. 265.  
Ante 113. a.)

## Sect. 210.

**M**ES en le county de Kent, ou terres et tenements sont tenus en gavelkind, la, ou, per le custome et use de temps dont memory ne curt, les fils males doivent ovelment enheriter, ceo custome est allowable, pur ceo que il estoit ove ascun reason; pur ceo que chescun firs est auxy grand gentlehome come l'eigne firs est, et per case a pluis grande honor et valour cressera, sil avoit rien per ces ancesters, ou autrement per adventure il ne puissoit tellement cresser; &c.

**B**UT in the county of Kent, where lands and tenements are holden in gavel-kinde, there, where, by the custome and use out of minde of man, the issues male ought equally to inherite, this custome is allowable, because it standeth with some reason; for every sonne is as great a gentleman as the eldest sonne is, and perchance will grow to greater honour and valour, if he hath any thing by his ancestors, or otherwise peradventure he would not increase so much, &c.

*"EN* [e] le county de Kent." For that in no county of England lands [y] at this day be of the nature of gavelkinde of common right, saving in Kent onely. But yet in divers parts of England, within divers mannors and seignories, the like custom is in force.

[e] Vide l'orient de Commetudinibus Kancie. ann. 21 E. 1.  
2 E. 3. 12.  
3 E. 3. 21. 32.  
23. Ass. pl. 12.  
8 E. 3. 42. b.  
(Post. 175. b.)  
[f] Vide Mirror, cap. 1. sect. 3.

*"En gavelkinde."* This is *gave all kinde*: for this custome giveth to all the sonnes alike (4).

*"Les fils males inheriter."* And this is the generall custome extending to sonnes. But yet [g] by custome, when one brother [140. b.] dieth without issue, all the other brethren may inherit (1).

[g] 23. Ass. pl. 31.  
(1. Ro. Ab. 624.)

*"Chescun firs est auxy grand gentlehome come l'eigne firs est."* By this it appeareth, that gentry and armes is of the nature of gavelkinde; for they descend to all the sonnes, every sonne being a gentleman alike. Which gentry and armes do not descend to all the brethren alone, but to all their posterity. But yet *jure primogeniture*, the eldest shall beare, as a badge of his birthright, his father's armes without any difference, for that, as *Littleton* saith, *Sectione 5.* he is more worthy of blood; but all the younger brethren shall give several differences, *et additio probat minoritatem*, and [h] *hereditas inter masculos jure civile est dividenda.*

[h] *Fortescue*, cap. 40.

"Ou

(3) [See Note 223.]  
(4) [See Note 224.]

[140. b.]  
(1) [See Note 225.]

"*Ou autrement peradventure il ne puisse tielment croistre.*" The reason of this is rendered by the poet.

Harpo.

*Haud facile emergunt, quorum virtutibus obstat  
Res augusta domi.*————

31 H. 2. ca. 2.  
V. 18 H. 6. cap. 1.  
(1. Sid. 134.)

But now by the statute of 31 H. 8. a great part of *Kent* is made descendable to the eldest sonne, according to the course of the common law (2), for that, by the meanes of that custome, divers ancient and great families after a few descents came to very little or nothing.

*In plures quoties rivos deducitur amnis,  
Fit minor, ac undâ deficiente, ferit.*

## Sect. 211.

**I**TEM, lou per custome appel Burgh English en ascun burgh, le fîts puisse inheritera tous les tenements, &c. ceo custome estoit oee ascun certaine reason; pur ceo que le fîts puisse (s'il fault pere et mere) pur cause de son juventute, poit le plus meins de tous ses freres luy mesme aider, &c.

**A**LSO, where by the custome called Burrough English in some burrough, the yongest son shall inherit all the tenements, &c. this custome also stands with some certaine reason; because that the yonger sonne (if he lacke father and mother) because of his yonger age, may least of all his brethren helpe himselfe, &c.

Vid. Sect. 166.

(7) 32. E. 3. de Age 61.

(8) Mich. 10 Ja. Ebor's case in Briefe de flux Judgement.

(9) Brit. 187. b.

"**P**ER custome apel Burgh English." Of this custome *Littleton* hath spoken before in the Chapter of Burgage. And in our bookes there is a special kind of Borough English [i]; as it shall descend to the yonger sonne, if he be not of the halfe blood; and if he be, then to the eldest sonne (3).

[k] Within the manor of *B.* in the county of *Berks*, there is such a custome, that if a man have divers daughters, and no son, and dieth, the eldest daughter shall only inherit; and if he have no daughters, but sisters, the eldest sister by the custome shall inherit, and sometimes the yongest. And divers other customes there be in like cases. And herewith agreeth *Britton*, who saith, [l] *de terres des anciens demeynes soit use selonque le antient usage del lieu, dount en aucun lieu le tient lieu per usage, que le heritage soit departable entre tous les enfans freres et sores, et en aucun lieu que le eigne avera tout, et en aucun lieu que le puisse frere avera tout.*

"Pur cause de son juventute, poit le plus meins de tous ses freres luy mesme aider, &c." Here by (*Uc.*) are implied those causes wherefore a youth is lesse able to ayd himselfe, &c. which the poet briefly and pithily expresseth thus:

Horac.

*Imberbis juvenis, tandem custode remoto,  
Gaudet equis, canibusque, et africi gramine campi,* [141. a.]  
*Cereus*

(2) [See Note 226.]

(3) [See Note 227.]

*Cereus in vitium flecti, monitoribus asper,  
Utilium tardus provisor, prodigus etis,  
Sublimis, cupidusque, et amata relinquere pernix.*

And againe, no living creature more infirme than man :

*Nil homine infirmum tellus animalia nutrit  
Inter cuncta magis.*—

Homer.

### Sect. 212.

**M**ES si home voile prescriber, que si ascuns avers fueront sur les demones de son mannor la damage feasants, que le seignior del mannor pur le temps estant ad use eux de distreyner, et le distresse retenir tanque fine fuit fait a luy pur le damage a la volunt, cest prescription est void ; pur ceo que il est encounter reason, que si tort soit fait a un home, que il de ceo serroit son judge demesne ; car per tiel voy, s'il avoit damages forsque al value d'un mail, il puissoit assesser et aver pur ceo C. lib. que serroit encounter reason. Et issint tiel prescription use, si ceo soit encounter reason, ceo ne doit (1) estre allow devant judges ; quia malus usus abolendus est (2).

**B**UT if a man will prescribe, that if any cattle were upon the demones of the mannor there doing damage, that the lord of the mannor for the time being hath used to distreine them, and the distresse to retaine till fine were made to him for the damages at his will, this prescription is voyd ; because it is against reason, that if wrong be done any man, that he thereof should be his own judge ; for by such way, if he had damages but to the value of an halfpeny, he might assesse and have therefore an C. pound, which should be against reason. And so such prescription, or any other prescription used, if it be against reason, this ought not, nor will not bee allowed before judges ; quia malus usus abolendus est.

**E**ST encounter reason, que si tort soit fait a un home, que il de ceo serra son judge demesne." For it is a maxime in law, *aliquis non debet esse iudex in propria causa*.<sup>\*</sup> And therefore a fine levied before the baylives of Salop, was reversed, because one of the bailifes was partie to the fine, *quia non potest esse iudex et pars* (3).

"Malus usus abolendus est : " and every use is evill, that is (as our author saith) against reason, *quia in consuetudinibus non diuturnitas temporis, sed soliditas rationis est considerata* (4).

And by this rule cited by our author, at the parliament holden at Kilkenny in Ireland, Lionel duke of Clarence being then lieutenant of that realme, the Irish customs called there the *Brehon law* (for that

<sup>1</sup> 50 E. 3. 23. 4 E. 3.  
4. 7 E. 3. 24. 38 E.  
3. 13. 8 H. 3. 4.  
3 H. 4. 8 H. 6. 19.  
5 H. 7. 9. b. \* Hyl.  
4 H. 4. custom of Salop. (2. Ro. Abr. 92. 93. 1. Ro. Abr. 402. 403.)

(3. Co. 94.)

An. 40 E. 3. at Kilkenny. The Brehon law.

(1) Instead of *doit* it is *voet* in L. and M. Boh. and P.

(2) Sect. 174. is placed here in L. and M. as we have formerly noticed. See 117. b. note 2.

(3) See 14. Vin. Abr. 573. 4. Com. Dig. 6.

(4) See Dav. Rep. 32. & 7. Vin. Abr. 180. 185.

that the *Irish* call their judges *Brehons*) was wholly abolished, for that (as the parliament sayd) it was no law, but a lewd custome, *et malus usus abolendus est* (5).

Vide Sect. 205.

(Vaugh. 202.)

11 H. 3.  
Rot. Pat.  
7. Co. 22. b.  
Calvin's case.

But our student must know, that king *John* in the twelfth yeare of his raigñ went into *Ireland*, and there, by the advice of grave and learned men in the laws whom he carried with him, by parliament *de communi omnium de Hiberniâ consensu*, ordained and established, that *Ireland* should be governed by the lawes of *England* (1), which of many of the *Irishmen*, according to [141. b.] their owne desire, was joyfully accepted and obeyed, and of many the same was soone after absolutely refused, preferring their *Brehon* law before the just and honourable lawes of *England*. *Rex, &c. barbaribus, militibus, et omnibus libere tenentibus salutem. Satis, ut credimus, vestra audivit discretio, quod quando bone memorie Johanne, quondam rex Angliæ, pater noster, venit in Hyberniam, ipse duxit secum viros discretos et legis peritos, quorum communi consilio, et ad instantiam Hybernensium, statuit et præcepit leges Anglicanas in Hybernâ, ita quod leges eadem in scripturas redactas petitis sub sigillo suo ad Secretarium Dublin.*

Rot. Patent.  
18 H. 3. M. 17.  
M. 24.

*Rex comitibus, baronibus, militibus, et liberis hominibus et omnibus alijs de terrâ Hybernæ salutem. Quia manifestè esse dignoscitur contra coronam et dignitatem nostram et consuetudines et leges regni nostri Angliæ, quas bone memorie dominus Johannes rex, pater noster, de communi omnium de Hybernâ consensu, teneri statuit in terrâ illâ, quod placita teneantur in curiâ Christianitatis de avorditionibus ecclesiarum et capellarum, vel de laico sepdo, vel de catallis, quæ non sunt de testamento, vel matrimonio: vobis mandamus, prohibentes quatenus hujusmodi placita in curiâ Christianitatis nullatenus equi presumatis in manifestum dignitatis et coronæ nostræ præjudicium, cituri pro certo quod si feceritis, dedimus in mandato justituario nostro Hybernæ statuta curiæ nostræ in Angliâ contra transgressionem hujus mandati nostri cum justitiâ procedat, et quod nostrum est exequatur. In cujus, &c. teste rege apud Wynchcomb, 28 die Octobris, anno regni nostri 18. Et mandatum est justituario Hybernæ, per literas clausas, quod prædictas literas patentes publice legi et teneri faciat.*

Rot. Patent.  
20 H. 3.

*Rex, &c. pro communi utilitate terræ Hybernæ, et pro unitate terrarum, provisum est, quod omnes leges et consuetudines, quæ in regno Angliæ tenentur, in Hybernâ teneantur, et eadem terra eisdem legibus subjaceat, ac per eandem regatur, sicut Johannes rex, cum illic esset, statuit et firmiter mandavit. Ideo volumus, quod omnia brevita de communi jure, quæ currunt in Angliâ, similiter currant in Hybernâ sub novo sigillo regis. In cujus, &c. teste meipso apud Woodstocke. Wherein it is to be observed, that union of lawes is the best meanes for the unity of countries. \* Una et eadem lex esse debet tam in regno Angliæ quam Hybernæ. [m] Terra Hybernæ inter se habet parlamentum et omni modas curias prout in Angliâ, et per idem parlamentum facit leges et mutat leges, et illi de eadem terrâ non obligantur per statuta in Angliâ, quia hi non habent milites parliamenti (2).*

By an act of parliament (called Poyning's law) holden in *Ireland* in the tenth yeare of *Henry* the seventh, it is enacted, that all statutes made in this realme of *England* before that time, should be of force and be put in use within the realme of *Ireland* (3); which (though it be by way of digression) is not unnecessary for our student to know. But now let us heare our author (4).

(5) [See Note 228.]  
[141. b.]

(1) [See Note 229.]

(2) [See Note 229.\*]

(3) Irish stat. 10 H. 7. c. 22.

(4) [See Note 230.]

\* Tri. 13 E. 1. coram rege in Theaur. in longo placito.  
[m] 9 H. 3. 12. in Camera Secretar. 1 H. 7. c. 4. Inst. 350.)



## CHAP. 12:

## Of Rents.

## Sect. 213:

**T**ROIS maners de rents y sont, c'est a savoir, rent service, rent charge, et rent secke. Rent service est, lou le tenant tient sa terre de son seignior per fealty et certaine rent, ou per homage fealtie et certaine rent, ou per autres services et certaine rent. Et si rent service soit a aucun jour, que doit estre pay, adorerre, le seignior poit distrainere pur ceo de common droit.

**T**HREE manner of rents there be, that is to say, rent service, rent charge, and rent secke. Rent service is, where the tenant holdeth his land of his lord, by fealtie and certaine rent, or by homage fealty and certaine rent, or by other services and certaine rent. And if rent service at any day, that it ought to be payed, be behinde, the lord may distraine for that of common right.

**S**OME have divided rents into foure kindes, viz. rent service, rent charge, rent distreynable of common right, (whereof somewhat shall be said in this Chapter) and rent secke.

"Rent," in *Latine redditus*, [a] by some *dicitur à redeundo, quia retroit, et quotannis redit*. \*And others say it is derived of *reddere*, for that the rent is reserved out of the profits of the land, and is not due till the tenant or lessee take the profits; for *reddendo inde* or *solvendo*, or *reservando inde*, or the like, [b] is as much to say as the tenant or lessee shall pay so much out of the profits of the lands; for *reddere nihil aliud est quàm acceptum aut aliquam partem ejusdem restituere. Seu reddere est quasi retro dare*, and hereof commeth *redditus* for a rent.

[142, a.] Here note, for the better understanding of ancient records, statutes, charters, &c. *gabel*, or *gavell*, *gablum*, *gabellum*, *gabelletum*, *galbelletum*, and *gavillettum*, doe signifie a rent (1), custome, duty, or service, yeelded or done to the king or any other lord; as, *Wallingford continet 276 hagas, i. e. domos redditentes 9 libras de gablo, i. e. de redditu*; and *Oxford, hæc urbs reddebat pro theolonio et gablo regi 20 l. et sextariis mellis, comiti Alpharo 10 libras*. And this is the legall signification thereof (2).

"Rent service." It is called a rent service, because it hath some corporall service incident unto it, which at least is fealty, as here it appeareth.

"Sa terre." [c] A rent service cannot be reserved out of any inheritance but such as is manurable, whereinto the lord may enter and take a distresse, as in lands and tenements, reversions, remainders, and, as some have said, out of the herbage of lands, and regularly not out of any inheritances incorporeall, or that lye in grant. [d] By act of law one rent or service may issue out of another; as if *A.* before the statute of *quia emptores terrarum* had given lands to *B.* to hold to him by fealty and ten shillings rent, and *B.* had made a feoffment in fee to *C.* &c. whereby there was a mesnalty created;

[a] Fleta, lib. 3. ca. 14. Britton ca. 41. Mirror ca. 2. sect. 10. Pl. Com. 132. b. 10. Co. 137. Clun's case. [b] Pl. Com. 138, 139, &c. in Browning's and Bestling's case. 35 H. 6. 34. Domesday. Statutum de gavillettis anno 10 E. 2. (Ante 37. b. Post. 144. 2. Bo. Abr. 446.)

Vide Sect. 218. (Ante 47. a.) [c] 44 E. 3. 46. 5 Co. 4. Scignior Mountjoy's case. 9. An. 34. 30. An. 5. 17 E. 3. 75. 7 Co. 33. But's case. Pl. Com. 139. [d] 3 H. 6. 21.

(1) See acc. ante 140. a. note 4.

(2) [See Note 231.]

8 H. 7. 36.  
21 H. 7. 39.  
1 H. 4. 62.  
10 H. 6. 12.  
19 E. 3. 14.  
Gard. 40.  
21 H. 6. 11.

created; in this case *C.* should hold of *B.* either by the same services the law created, or such as he specially reserved, and *B.* did by operation of law hold those services of *A.* by fealty and ten shillings rent, that is to say, by rent and service out of rent and service: and if the rent be behinde, the lord paramount may distraine upon the land for his rent, for both mesnalty and seigniorie doe issue out of the land, the mesnalty immediately, and the seigniorie mediately, which is worthy of due consideration and observation.

[c] Britton fol.  
100. a.  
(Ante 94. a.)  
[f] Fleta lib.  
3. ca. 14.  
(Ante 91. b.)

"*Certaine rent.*" [c] For the rent must be certaine, or which may bee reduced to a certainty; for *id certum est, quod certum reddi potest.* [f] *Continetur charta reddendo inde annuatim ad tales terminos, vel faciendo inde talia servitia, vel tales consuetudines, quæ omnia debent esse certa et in chartâ expressa, &c.* But of this I have spoken Sect. 136. And the rent may as well be in delivery of hens, capons, roses, spurres, bowes, shafts, horses, hawkes, pepper, comine, wheat, or other profit that lyeth in render, office, attendance, and such like, as in payment of money. [g] But a man upon his feoffment or conveyance cannot reserve to him parcell of the annual profits themselves, as to reserve the vesture or herbage of the land or the like (3), for that should be repugnant to the grant: *non debet enim esse reservatio de proficuis ipsius, quia ea conceduntur, sed de redditu novo extra proficua.*

[g] 38 H. 6. 32. a.  
(Ante 47. a. 4. b.)

"*Pot distrainer per .co.*" For where there is a fealty, &c. incident to the rent, there is a distresse incident also thereunto. [h] But it is to be understood, that for a rent or service, the lord cannot distreine in the night, but in the day time: and so it is of a rent charge. But for damage feasaunt one may distreine in the night, otherwise it may bee the beasts will be gone before he can take them.

[h] Mirror ca.  
2 sect. 16.  
20 R. 3.  
Avovery 137.  
11 H. 7. 6.

"*De common droit.*" Of common right, [i] that is, by the common law, so called, because the common law is the best and most common birth-right that the subject hath for the safeguard and defence, not onely of his goods, lands and revenues, but of his wife and children, his body, fame, and life also. So as the meaning of *Lit'leton* in this particular case is, that the lord may distreine for his rent of common right, that is, by the common law, without any particular reservation or provision of the party. And it is to be observed, that the common law of *England* sometimes is called right, sometimes common right, and sometimes *communis justitia.* In the grand charter the common law is called right. *Rectum nulli vendemus, nulli negabimus, aut differemus justiciam vel rectum.* In the statute of *W. 1. c. 1.* it is called *common droit.* *En primes voet le roy, et commande, que le peice de s. eglise et de la terre soit bien garde et maintaine en tous puints, et que common droit soit fait a tous, auxibien aux poers come aux riches, sauns regard de nuluy;* which agreeth with the ancient law in the time of king *Edgar.* *Porro autem has populo quas servet proponimus leges. Primum publici juris beneficio quisquam frui'tur, idque ex æquo et bono, sive is dives sive inops fuerit, jus reddit.* And *Fleta* saith, *Item quod pax ecclesie et terre inviolabiliter observetur, et quod communis justitia singulis furit*

Lamb. fo. 78.  
inter Leges Regis  
Edgari. Fleta,  
lib. 1. c. 22.

(3) See Bro. Abr. *Reservation* 46. Dr. & Stud. Dial. 2. c. 22.

*pariter exhibeatur.* And all the commissions and charters for execution of justice are, *facturi quod ad justitiam pertinet secundum legem et consuetudinem Anglia.* So as in truth justice is the daughter of the law, for the law bringeth her forth. And in this sense being largely taken, as well the statutes and customes of the

[142. b.] realme, as that which is properly the common law, is included within *common droit.* Littleton in this his treatise nameth *common droit* sixe times.

Vide Sect. 214.  
210. 220. 232. 331.

## Sect. 214.

**E**T si home voyloit doner terres ou tenements a un auter en taile, rendant a luy certain rent per an (1), il de common droit poit distreiner pur le rent aderere, coment que tiel done fait fait sans fait, pur ceo que tiel rent est rent service. En mesme le maner est, si leas soit fait a un home pur terme de vie, ou d'auter vie (2), rendant al lessor certaine rent, ou pur terme de ans rendant certaine rent.

**A**ND if a man will give lands or tenements to another in the taile, yeelding to him certaine rent by the yeare, hee of common right may distraine for the rent behind, though that such gift was made without deed, because that such rent is rent service. In the same manner it is, if a lease be made to a man for life, or the life of another, rendering to the lessor certaine rent, or for tearme of yeares rendring rent.

“**S**AUNTS fait.” For it is a rule in law, that a rent service may be reserved without deed.

35 H. 8. 34.  
(Cro. Eliz. 33.  
Post. 225. b.)

“*En mesme le manner, si lease soit fait, &c.*” For these be rents services, because fealty is incident to these rents; for, as it hath bin said before) a lessee for life or years shall doe fealty. And if a man make a lease at will, reserving a rent, the lessee shall not doe fealty, and yet the lessor shall distreine for the rent of common right.

Vide Sect. 131,  
132.

“*Rendant*” commeth of the word *reddo*, i. e. *rem pro re dare*, and signifieth yeelding or repaying: but of this I have spoken before in this Chapter, Sect. 213.

## Sect. 215.

**M**ES en tiel cas, ou home sur tiel done ou lease v ille reserver a luy rent service, il covient, que le reversion de les terres et tenements soit en le doner ou lessor. Car si home voile faire feoffement en fee, ou voile doner terres en taile, le remainder oustre en fee simple, sans fait, reservant

**B**UT in such case, where a man upon such a gift or lease will reserve to him a rent service, it behoveth, that the reversion of the lands and tenements be in the doner or lessor. For if a man will make a feoffment in fee, or will give lands in taile, the remainder over in fee simple

(1) *Per an* not in L. and M. nor Roh. but in P. and Red.

(2) *Ou d'auter vie* not in L. and M. nor Roh. but in P. and Red.

vant a luy certaine rent, tel reserva-  
tion est void, par ceo que nul rever-  
sion remaine en le donor, et tel  
tenant tient la terre immediatment de  
le seignior, de que son donor tenoit,  
&c.

simple, without deed, reserving to  
him a certaine rent, this reservation  
is void, for that no reversion re-  
maines in the donor, and such te-  
nant holds his land immediately of  
the lord, of whom his donor held,  
&c.

(Anno 22. h.  
Plowd. 151. a. 102.  
a. Cro. Cha. 400.  
222. 2. Ro. Abr.  
66.)

**"REVERSION,"** *Reversio* commeth of the Latine word *re-  
vertor*, and signifieth a returning againe; and therefore  
*reversio terre est tanquam terra revertens in possessione donatori,  
sive heredibus suis, post donum finitum, &c.* as in the cases that  
*Littleton* here hath put.

(Abbs 47. a.)

**"Il covient que le reversion, &c. soit en le donor ou lessor, &c."**  
This is not to be understood only of a reversion immediately expect-  
tant upon the gift or lease. For if a man maketh a gift in tayle, the  
remainder in tayle, reserving a rent, and keepe the reversion in  
himselfe, this is a rent service.

(2) 4 E. 4. 48.  
26. Am. pl. 66.  
(Ant. 47. a.)  
(1) 30 H. 6. 34.  
(Post. 317. a.)

**"Reservant."** *Reserver* commeth of the Latine word  
*reservo*, that is, to provide for store; as when a man de- [143. a.]  
parteth with his land, he reserveth or provideth for himselfe a rent  
for his owne livelihood. And sometime it hath the force of *saving*  
or *excepting*. So as [k] sometime it serveth to reserve a new thing,  
viz. a rent, and [l] sometime to except part of the thing in *case* that  
is granted (1).

(Ant. 23. a.)  
(m) Litt. 2. 4.  
Old Tenures 5.  
38 E. 3. 7.  
33 H. 6. 7.

And it is to be understood, that in the case of the gift in tayle,  
lease for life or years, the fealtie is an incident inseparable to the  
reversion, so as the donor or lessor cannot grant the reversion over,  
and save to himselfe the fealty, or such like service. But the rent  
he may except; because the rent, although it be incident to the  
reversion; yet it is not inseparably incident. If a man maketh a  
gift in tayle without any reservation, the donee shall hold of the  
donor by the same services that he held over. [m] But otherwise  
it is of an estate for life or years; for there if he reserveth nothing,  
he shall have fealty onely, which is an incident inseparable to the  
reversion, as hath been said.

[n] 40 E. 3. 20.  
20 E. 4. 1.  
23 E. 4. 10.  
28 E. 4. 18.  
28 E. 4. 12.  
28 H. 8. 4.  
3 H. 7. 13.  
F.N.B. 219.  
11 H. 4. 39.  
38 E. 3. 36.  
44 E. 3. 8.  
(Ant. 49. b.)  
[o] 3 Co. 51.  
Chalmers's case.  
(Ant. 49. a. Plowd.  
24. a. 36. a.)

**"Le remainder oustre en fee simple sans fait."** Here it appear-  
eth, that if a man maketh a gift in tayle, the remainder in fee, with-  
out deed [n], the remainder is good, and passeth out of the donor  
by the livery of seisin: and so it is of a lease for life or yeares, the  
remainder over in fee; for the particular estate and the remainder,  
to many intents and purposes, make but one estate in judgement of  
law. *Vide* Sect. 60.

**"Remainder,"** in legall Latine, is *remanere*, coming of the La-  
tine worde *remaneo*; for that [o] it is a remainder or remnant of an  
estate in lands or tenements, expectant upon a particular estate  
created together with the same at one time, as in the cases here of  
*Littleton* appeareth (2).

(1) [See Note 332.]

(2) See Fearn's Ess. on Conting. Rem. 3d ed. p. 5. to 11.

## Sect. 216.

**ET** ceo est per force de le statute de quia emptores terrarum. Car devaunt le dit estatute, si home fesoit un feoffement en fee simple, per fait ou sans fait, rendant a luy et a ses heires certaine rent, ceo fuit rent service, et pur ceo il pouvoit distraire de common droit; et s'il fuit nul reservation d'ascun rent, ne d'ascun service, uncore le feoffee tenust del feoffor per autiel service, que le feoffor tenust oustre de son seignior prochaine paramont.

**AND** this is by force of the statute of *quia emptores terrarum*. For before that statute, if a man had made a feoffment in fee simple, by deed or without deed, yeelding to him and to his heires a certaine rent, this was a rent service, and for this hee might have distrained of common right; and if there were no reservation of any rent, nor of any service, yet the feoffee held of the feoffor by the same service, as the feoffor did hold over of his lord next paramont.

**“QUIA emptores terrarum.”**

Hereof is spoken before in the Chapter of *Frankalmoigne*, Sectione 140.

(2. Inst. 806.  
Ant. 98. b.)

**“Per fait ou sans fait, &c.”** For all rent services may be reserved without deed (as hath been said), and as it appeareth here.

And at the common law if a man had made a feoffment in fee by parol, he might upon that feoffment have reserved a rent to him and his heires; because it was a rent-service, and a tenure thereby created.

**“Et s'il fuit nul reservation, &c. le feoffee tenust del feoffor per autiels services, &c.”** This is evident, and agreeth with our bookes [\*], that in this case the law created the tenure; wherein it is to bee observed, how the law regardeth equitie and equalitie, without any provision or reservation of the party.

(Dy. 146. b.  
Ant. 23. a.)

[\*] Britton  
fol. 100.  
2 E. 3. 33.  
25 E. 3. gard. 21.  
49 E. 3. 10.  
22. Ass. pl. 53.  
7 H. 4. 14.  
23 E. 3. avowrie  
255. 4 H. 6.  
Littl. cap. Tailz,  
Sect.

*Ipsæ etenim leges cupiunt, ut jure regantur.*

[143. b.]

## Sect. 217.

**MES** si home, per fait endent, a cel jour fait tiel done en fee taile (1), le remainder ouster en fee; ou lease a terme de vie, le remainder ouster en fee; ou un feoffment en fee; et per meme l'indenture il reserve a luy et a ses heires un certaine rent, et que si le rent soit aderere, que bien liroit a luy et a ses heires a distraire,

**BUT** if a man, by deed indented, at this day maketh such a gift in fee taile, the remainder over in fee; or a lease for life, the remainder over in fee; or a feoffment in fee; and by the same indenture he reserveth to him and to his heires a certaine rent, and that if the rent be behind, it shall be lawfull for him and

(1) Fee not in L. and M. Rph. and Redm.

*treiner, &c. tiel rent est rent charge ; pur ceo que tielx terres ou tenements sont charges ore tiel distresse per force de le scripture tantsolement, et nemy de common droit. Et si tiel home, sur fait endent, reserua a luy et a ses heires certain rent, sans aucun tiel clause mise en le fait, que il poit distreiner, donque tiel rent est rent secke; pur ceo que il ne poit tener de aver le rent, si ceo soit deny, per meane de distresse; et s'il ne fuit unques en cest ous seisie de le rent, il est sans remedie, oome serra dit apres.*

and his heires to distreine, &c. such a rent is a rent charge; because such lands or tenements are charged with such distresse by force of the writing only, and not of common right. And if such a man, upon a deed indented, reserve to him and to his heires a certaine rent, without any such clause put in the deed, that he may distreine, then such rent is rent secke; for that hee cannot come to have the rent, if it be denied, by way of distres; and if in this case hee were never seised of the rent, he is without remedie, as shall be said hereafter (2).

Britton fol. 160.  
Fleta lib. 3.  
ca. 14. Vide  
Sect. 370.  
Post. 320. a.  
(1) Co. 20. b.  
2. Ro. Abr. 22.  
3 Leon 10.  
2. Inst. 672.)  
[p] 8 E. 4. 5.  
11 E. 7. 25.  
26 H. 6. 34.  
20 E. 4. 13.  
17 E. 3.  
12 H. 4. 17.  
(2) Ro. Abr. 449.)

[q] Fleta lib. 3.  
ca. 14. Britton  
fol. 160.

**"PER fait endent."** It cannot be a deed indented unlesse it be actually indented; for albeit the words of the deed be *hac indentura*, &c. yet if it be not indented indeed, it is no indenture. But if the deed be indented, albeit the words of the deed be not *hac indentura*, yet it is an indenture (3).

And it is holden that [h] if a feoffment in fee be made by deed poll reserving a rent, this reservation is good; for when the feoffee accepts the deed and livery of the land, he agreeth to the rent, and the rent is reserved by the words of the feoffor, and not by the grant of the feoffee. But of this more hereafter. In the mean time it is to be noted, that of ancient time a deed indented was called *charta cyrographata*; (4) or *charta communis*, because each party had a part. And a deed poll was called *charta de una parte*. [q] *Charta autem de pura donatione et simpliciter penes donatorium et ejus heredes debent remanere. Communes vero duplicari debent, ita quod quilibet habeat partem suam; vel si una sit tantum, tunc in eadem manu communis amici utriusque ponatur, salvo custodienda, dum cuilibet partium necesse fuerit exhibendum.*

[r] 12 E. 2.  
feoffments 2.  
18 E. 2. Am. 301.  
(Am. 47. a.)  
2. Ro. Abr. 447.  
Cro. Cha. 380.)  
[s] 35 H. 6. 36.  
(2) Ro. Abr. 447.  
434. Mo. 62. 168.  
Old Tenures.  
Britton cap.  
66. 164.  
F. N. B. 210.  
Bract. 86.  
[t] 7 Co. 28. b.  
Mand's case.  
H. 43 El. in  
Comm. Banco.  
Rot. 1104. Inter  
Mand & Gro  
Ewy.

**"Reservant a luy."** [r] Note, it is a maxime in law, that the rent must be reserved to him from whom the state of the land moveth, and not to a stranger. [s] But some doe hold, that otherwise it is in the case of the king.

**"Et tiel rent est rent charge."** It is called a rent charge because the land for payment thereof is charged with a distresse. If it be to the whole value of the land, or to the fourth part of the value, then the rent is called a fee farme. (5) Here *Littleton* putteth his case, and so did he in the next Section before, of a clause of distresse generally granted. [t] A man granted a rent out of certaine land, *pro consilio impenso et impendendo*, to have and to hold to him and to his assignees for terme of his life, payable at four feasts in the yeare, and for default of payment upon demand it

(2) See post. Sect. 341.

(3) [See Note 233.]

(4) [See Note 234.]

(5) [See Note 235.]

it should be lawfull for him to distrayne; the grantee granted the rent over; the assignee after one of the dayes demanded the rent, and distreyned, and the distresse adjudged lawfull; for he needs not make a demand at any of the dayes, as in the case of re-entry, but he may demand it when he will, for it is only to entitle him to his remedy for his meere duty (1).

“*Distreyner, &c.*” Here by (*&c.*) is implied what things are distreynable, which elsewhere is expressed at large. Also where the distresse is to be taken in the same land, and in some other, which with many differences is set downe in his proper place.

“*Il serra sans remedie.*” Note, that upon a reservation of a rent upon a feoffment in fee by deed indented, [*w*] the feoffor shall not have a writ of annuity, because the words of reservation, as *reddendo, solvendo, faciendo, tenendo, reservando, &c.* are the words of the feoffor, and not of the feoffee, albeit the feoffee by acceptance of the estate is bound thereby.

And where *Littleton* putteth his case, when a reservation is made upon an estate that passeth by livery, the same law it is, if a man at this day doe bargain and sell his land by deed indented and inrolled according to the statute, a rent may be reserved thereupon; for albeit an use had onely passed by the common law, yet now by the statute of 27 H. 8. cap. 10. the use and possession passe together, and so it was adjudged. \* And so it is of a grant of a reversion or remainder, and any other conveyance of lands or tenements, whereby any estate doth passe.

M. 40 & 41 El.  
in Com. Banco  
inter Stanly &  
Reed. 10 El.  
Dyer 342.  
Plut. 32. 42.  
Post. 155. b.  
2. Ro. Abr. 428.  
Dy. 2. Post. 302.  
a. 204. a. Dy. 61.  
Flower. 7. Perik.  
a. 101. Mo. 5.  
March 149.  
(Vide Sect. 231.  
Ant. 47. a.)

[w] 33 E. 3.  
Annuity 52.  
1 H. 4. 5.  
25. Ant. pl. 66.  
21 E. 4.  
(1. Ro. Abr. 226.)

\* Mich. 39 & 40  
El. in Com.  
Banco inter  
Wicks & Tillard,

## Sect. 218.

**A**UXY, si homo scisic de certain terre graunt, per un fait polle, ou per indenture, un annual rent issuant hors de mesme la terre, a un auter en fee, ou en fee taile, ou pur terme de vie, &c. ovesque clause de distresse, &c. donques ceo est rent charge; et si le grant soit sans clause de distresse, donques il est rent seck. Et nota, que rent secke idem est quod redditus siccus: pur ceo que nul distresse est incident a ceo.

**A**LSO, if a man seised of certain land grant, by a deed poll, or by indenture, a yearely rent to be issuing out of the same land, to another in fee, or in fee taile, or for terme of life, &c. with a clause of distresse, &c. then this is a rent charge; and if the grant be without clause of distresse, then it is a rent secke. And note, that rent secke idem est quod redditus siccus; for that no distresse is incident unto it.

“*SEISIE de terre.*” [*x*] Note, that a rent cannot be granted out of a piscary, a common, an advowson, or such like incorporeal inheritances, but out of lands or tenements whereunto the grantee may have recourse to distreyne, or which may be put in view to the recognitors of an assise, as hath bene said before in this chapter.

[x] 32 E. 3. tit  
seis. the. 100.  
40 E. 3.  
Pl. Com. 139.  
(Ant. 47. a.  
143. a. Vaugh  
202. 204.)

(1) See further as to this difference between a re-entry to avoid an estate and an entry to distrain, the second point in *Maund's case* above cited, and *Gilb. on rents* 73.

Vide Sect. 212.  
 [x] 10 E. 4. 3. b.  
 33 H. 6. 5.  
 80 E. 3. 9.  
 8 E. 4. 8.  
 8 E. 3. Fines 1.  
 9 E. 3. 7.  
 46 E. 3. 27.  
 31 H. 6. 6.  
 temp. E. 1.  
 Ann. 62.  
 \* 19 E. 3.  
 Title 24.  
 (Apt. 114. a.  
 6. Co. 88.)

chapter. And though it be out of lands or tenements, [z] yet it must be out of an estate that passeth by the conveyance (as by all *Littleton's* examples appeareth), and not out of a right; as if the disseisee release to the disseisor of land, reserving a rent, the reservation is void, *et sic de similibus*.

“*Grant per fait.*” \* Also a man may have a rent by prescription.

“*Rent secke idem est quod redditus siccus.*” This needs no explanation, for *Littleton* expounds it himselfe.

## Sect. 219.

[144. b]

**I**TEM, si home granta per son fait un rent charge a un auter, et le rent est arrere, le grantee poet eslier, s'il voet suer un brieve de annuitie de ceo envers le grantor, ou distreyner pur le rent arrere, et le distresse retenir tanque il soit de ceo pay. Mes il ne poit faire, ne aver, ambideux ensemble, &c. Car s'il recover per brieve d'annuity, donques la terre est discharge de le distresse, &c. Et s'il ne suist brieve de annuitie, mes distreine pur les arrerages, et le tenant suist son replegiare, et donques le grantee avowa le prisel de le distresse en le terre en court de record, donques est la terre charge, et la person del grantor discharge d'action d'annuity.

**A**LSO, if a man grant by his deed a rent charge to another, and the rent is behind, the grantee may chuse, whether he will sue a writ of annuity for this against the grantor, or distreine for the rent behinde, and the distresse detain until he be payd. But he cannot doe, or have, both together, &c. For if he recovers by a writ of annuity, then the land is discharged of the distress, &c. And if he doth not sue a writ of annuity, but distreine for the arrerages, and the tenant sueth his replevin, and then the grantee avow the taking of the distresse in the land in a court of record, then is the land charged, and the person of the grantor discharged of the action of annuity.

(7. Co. 24.  
 1. Ro. Abr. 227.)

“**R**ENT charge.” Here it appeareth by *Littleton*, that this *primâ facie* is a rent charge, whereof in this chapter shall be spoken more at large.

And so it is of a rent secke.

“*Home grant.*” Put case, that *A.* be seised of lands in fee, and he and *B.* grant a rent charge to one in fee, this *primâ facie* is the grant of *A.* and the confirmation of *B.* but yet the grantee may have a writ of annuity against both. [a] Two men grant an annuity of twenty pounds *per annum* to another, although the persons be severall, yet he shall have but one annuity. But if the grant be, *obligamus nos, et utrumque nostrum*, the grantee may have a writ of annuity against either of them; but he shall have but one satisfaction.

[a] 16 E. 2.  
 tit. Annuity 47.  
 Vide Sect. 314.

(5. Co. 86.  
 1. Ro. Abr. 898.  
 Hob. 89.  
 Fflowd. 439.)

[b] Doct. & Stud.  
 ca. 3. 17 El.  
 Dyer 344. b.  
 45 E. 3.  
 Executor 72.  
 (Finch's Law 301.  
 F. N. B. 153. a.)

“*Brieve de annuitie*” is a writ for the recovery of an annuity. [b] An annuity is a yearly payment of a certaine summe of money granted



granted to another in fee for life or yeares, charging the person of the grantor onely. [c] But not onely the grantee, but his heire and his and their grantee, (1) also shall have a writ of annuity. [d] But if a rent charge be granted to a man and his heires, he shall not have a writ of annuity against the heire of the grantor, albeit he hath assets, unless the grant be for him and his heires (2).

"*Poet eslier.*" The grantee hath election to bring a writ of annuity, and charging the person onely to make it personall; or to distraine upon the land, and to make it real.

But if a man grant a rent charge to a man and his heires, and dieth, and his wife bring a writ of dower against the heire, the heire in barre of her dower claimes the same to be an annuity and no rent charge; yet the wife shall recover her dower; for he cannot determine his election by claime, but by suing of a writ of annuity (as *Littleton* saith), neither can the heir have after the endowment an annuity for the two parts; for that should not be according to the deed of grant, for either the whole must be a rent charge, or the whole an annuity. But *Littleton* is to be understood with some limitation: [e] for of a rent granted for owelty of partition, a writ of annuity doth not lie, because it is of the nature of

[145. a.] the land descended. Also of such a rent as may be granted without a deed of writ of annuitie doth not lie, though it be granted by deed.

[f] And here it is to be noted, that there is no election given of two severall things, as if the grant were of an annuitie or a robe yearly, &c. for there the grantor hath election at the day to deliver which he would. But here are two remedies given for one yearly summe, and consequently the grantee shall at any time have election to take which of the remedies hee will; for in all cases where severall remedies be given, the party to whom the law giveth the remedies, it giveth him withall election to take which of the remedies he will.

"*Mes il ne poet faire ou aver ambideux ensemble.*" For then he should recover one thing twice, which should be a double charge to the grantor.

Note, as to elections, these diversities following: (1)

First, when nothing passeth to the feoffee or grantee before election to have the one thing or the other, there the election ought to be made in the life of the parties, and the heir or executor cannot make election. But when an estate or interest passes immediately to the feoffee, donee, or grantee, there election may be made by them or by their heires or executors.

Secondly, when one and the same thing passeth to the donee or grantee, and the donee or grantee hath election in what manner or degree he will take this, there the interest passeth immediately, and the partie, his heires or executors, may make election when they will.

Thirdly,

[145. a.]

(1) Lord Coke extracts the six following rules concerning election *verbatim* from his own Reports. See 2. Co. 36. b.

[c] 3 E. 6.  
Dyer 65. And  
Sergeante Bend-  
loes reporteth, that  
so was the opinion  
of the Court.  
[d] 2 H. 4. 18.  
Dyer 17 Eliz. 344.  
b.  
(10 Co. 128.  
Hob. 58.  
Plowd. 467. a.  
1 Ro. Abr. 226.)

(1 Co. 36. and Mo.  
83.)

[e] 20 Ass. p. 23.

[f] Sir Rowland  
Heyward's case.  
2 Co. 36.  
23 E. 3. 98.  
41 E. 3. 10. a.]  
2 H. 4. 12.  
6 H. 4. 10.  
36 H. 6. 10.  
9 E. 4. 46.  
21 E. 4. 55. b.  
1 E. 5. 1.  
F. N. B. 121.  
(Plowd. 439.  
Fort. 310. b.  
1 Ro. Abr.  
446. 447. 725.  
Hob. 58.)  
2 Co. 36. 37. in Sir  
Rowland Hey-  
ward's case.

(1) [See Note 236.]

(2) [See Note 237.]

Thirdly, when election is given to several persons, there the first election made by any of the persons shall stand.

Fourthly, in case an election be given of two several things, always he, which is the first agent, and which ought to doe the first act, shall have the election. As if a man granteth a rent of twentie shillings or a robe to one and to his heires, the grantor shall have the election; for he is the first agent, by payment of the one, or deliverie of the other. So if a man maketh a lease, rendering a rent or a robe, the lessee shall have the election *causâ quâ supra*. And with this agree the bookes in the \* margent. [g] But if I give unto you one of my horses in my stable, there you shall have the election; for you shall be the first agent by taking or seisure of one of them. And if one grant to another twentie loads of hazill or twentie loads of maple to be taken in his wood of D. there the grantee shall have election; for he ought to doe the first act, *scil.* to fell and take the same.

Fifthly, when the thing granted is of things annuall, and are to have continuance, there the election remaineth to the grantor, (in case where the law giveth to him election) as well after the day, as before. Otherwise it is when the things are to be performed *unicâ vice*. And therefore if I grant to another for life an annuitie or a robe at the feast of Easter, and both are behind, the grantee ought to bring his writ of annuitie in the disjunctive; for if he bring his writ of annuitie for the one onely, and recover, this judgement shall determine his election for ever; for he shall never have a writ of annuitie afterwards, but a *scire facias* upon the said judgement. Which reason, *Fitzherbert*, in his *Natura Brevium*, (2) not observing, held an opinion to the contrarie. But if I contract with you to pay unto you twentie shillings or a robe at the feast of Easter, after the feast you may bring an action of debt for the one or for the other.

Sixtly, the feoffee by his act and wrong may lose his election, and give the same to the feoffor. As if one infeoffe another of two acres, to have and to hold the one for life, and the other in taile, and he before election maketh a feoffment of both; in this case, the feoffor shall enter into which of them he will, for the act and wrong of the feoffee. (3)

"*S'il recover en briefe de annuitie, donques est la terre discharge de distreinc.*" Here is to be observed, that this determination of the election of the grantee must be by action or suit in court of record; [h] for albeit the grantee distreine for the rent, yet hee may bring a writ of annuitie and discharge the land. And *Littleton* putteth his case here surely upon a recoverie in a writ of annuitie. [i] But if the grantee doth bring a writ of annuitie, and at the returne thereof appeare and count, this is a determination of his election in a court of record, albeit he never proceedeth any further. [k] As if a wife be endowed *ex assensu patris*, and the husband dieth, the wife hath election either to have her dower at the common law or *ex assensu patris* (4); if she bring a writ of dower at the common law, and count, albeit she recover not, yet shall she never after claime her dower *ex assensu patris*.

So

(3) See F. N. B. 152. G.

(3) [See Note 238.]

(4) See acc. before Sect. 41.

(1 Ro. Abr. 725.  
Ant. 46. b.  
Plowd. 6. post.  
140. a. Hob. 174)  
99 E. 4. 30. b.  
13 E. 4. 4. b.  
1. 8 E. 4. 6. b.  
11 E. 3. annu.  
27. 11 Ass. p. 8.  
20 Ass. 26.  
3 E. 3. tit.  
Ass. 175.  
43 E. 3. tit.  
Barre 104.  
(5 Co. 25. 41.)  
[g] 2 H. 7. 23. a.

(Ant. 90. b.  
6 Co. 46.)

9 E. 4. 36.  
13 E. 4. 4. and the  
other abovesaid  
bookes.  
(Plowd. 6.  
1 Ro. Abr. 726.)

[h] 17 El. Dyer  
344. b.

[i] F. N. B.  
152. a.  
5 H. 7. 33. b.

[k] 12 E. 2.  
Dower 158.

[7] So if the grantee bring an assise for the rent, and make his plaint, he shall never after bring a writ of annuitie. But the purchasing of a writ of annuitie, and entrie of it in court of record, or of an assise, is no determination of the election; because an estranger may purchase a writ in the name of the grantee, and enter it of record: but if the grantee appeare thereunto, &c. then this doth amount to a determination of his election, as hath been said.

[145. b.] “*Son replegiare.*” Littleton spake immediately before of *un brieve d’annuity*, but here he saith *son replegiare*; because goods may be replevied two manner of wayes, viz. by writ, and that is by the common law, or by the pleint, and that is by the statutes for the more speedy having againe of the cattell and goods. A *replegiare* lyeth, as Littleton here teacheth us, where goods are distreined and impounded, the owner of the goods may have a writ *de replegiari facias*, whereby the sherife is commanded, taking sureties in that behalfe, to redeliver the goods distreined to the owner, or upon complaint made to the sherife he ought to make a replevy in the [county]. *Replegiare* is compounded of *re* and *plegiare*, as much as to say, as to redeliver upon pledges or sureties; and in the statute of *Marlebridge*, *deliberare* is used for *replegiare*. [m] And the sherife ought to take two kinde of pledges, one by the common law, and they be *plegii de prosequendo*, and another by the statute, viz. *plegii de retorno habendo*. Vide Sect. 58. what things may lawfully be distreyned, whereupon a *replegiare* may be sued. The formes of the writ you shall reade in the Register and F.N.B.\*

[n] It is a generall rule, that the plaintife must have the property of the goods in him at the time of the taking. [o] But yet if the goods of a villeine be distrayned, the lord of the villeine shall have a replevy; because the bringing of the replevy amounts to a clayme in law, and vests the property in the plaintife. But in that case if the goods of the villeine be taken by a trespasse, the lord shall have no replevy; because the villeine had but a right.

[h] But there be two kinde of properties; a generall propertie, which every absolute owner hath; and a speciall propertie, as goods pledged or taken to manure his lands, or the like; and of both these a *replegiare* doth lye.

And albeit it be provided by the statute of *Marlebridge*, [cap. 21.] *quod vicecomes post querimoniam inde sibi factam ea, sine impedimento vel contradictione ejus qui dicta averia cepert, deliberare possit, &c.* [g] yet where the defendant claimes property, the sherife cannot proceed; for it is a rule in law, that property ought to be tryed by writ. And therefore in that case where the tryall is by pleint, the plaintife may have a writ *de proprietate probanda* directed to the sherife to trie the propertie; and if thereupon it be found for the plaintife, then the sherife to make deliverance (for so be the words of the writ); and if for the defendant, he can no further proceed. But that is but an enquest of office; and therefore if thereby it bee found against the plaintife, yet he may have a writ of replevy to the sherife; and if he returne the claime of propertie, &c. yet shall it proceed in the court of common pleas where the property shall be put in issue and finally tried. And the sherife may take a pleint upon the said act out of the county, and make replevyn presently; for it should be inconvenient for the owner to forbear his cattell till the county day.

[7] 10 E. 4. 17.

(2. Inst. 139.)  
Glauvil. lib. 12.  
ca. 12.  
Marlbr. ca. 21.  
W. 1. ca. 16, 17.  
W. 2. ca. 39.  
Fleta, lib. 2. ca. 40.

Marlbr. ca. 21.  
(Doctr. Plac. 314.)  
21 H. 6. Returne  
de Vic. 17.  
(Port. 161. a.)

[m] W. 2. ca. 2.  
Fleta, lib. 4.  
ca. 5. 4 H. 6. 15.

\*Reg. F. N. B. 68.

[n] 3 E. 3. 74.  
6 H. 4. 2. & 39.  
9 H. 6. 39.  
20 H. 6. 19.  
[o] 33 E. 3.  
Replev. 43.  
43 E. 3. 18.  
9 H. 6. 25.  
F. N. B. 68. F.  
6 H. 7. 9. 19 E. 3.  
Repl. 32.  
[p] 42 E. 3. 18.  
11 H. 4. 17. 23.  
47 E. 3. 12.  
48 E. 3. 20.  
7 H. 4. 17.  
(2. Ho. Abr. 430.  
Plowd. 524.)  
Marlbr. ca. 21.

[g] 30 E. 3. 22.  
31 E. 3.  
Replev. 35. & 4.  
7 H. 4. 26. 28.  
31 H. 6.  
Prop. Prob. 5.  
1 E. 4. 9.  
21 E. 4. 64.  
2 Edm. Dyer 173.  
21 E. 4. 65.  
(2. Ho. Abr. 431.)

It

[r] 5 E. 3. 38.  
11 H. 4. 4.  
17 E. 2. Propr.  
Prob. 6.

[r] It is to be noted, that a man cannot claime propertie by his bailife or servant ; and the reason is, for that if the clayme fall out to be false he shall be fined for his contempt, which the lord cannot be unlesse he maketh clayme himselfe ; for *nemo punitur pro alieno delicto* (1).

34 H. 6. 47.

In a speciall case a man may have a replevyn of goods not distreyned. As if the mesne put in his cattell in lieu of the cattell of the tenant paravaile, that he is bound to acquite, he shall have a replevyn of those cattell that never were distreyned.

31 E. 3. Gage)  
deliver 5.

If a man by his deed grant a rent with clause of distresse, and grant further, that hee shall keep the goods distreyned against gages and pledges, untill the rent be payd, yet shall the sherife replevy the goods distreyned ; for it is against the nature of such a distresse to be irreplevisable, and by such an [invention] the currant of replevyng should be overthrown to the hindrance of the common wealth ; and therefore it was disallowed by the whole court, and awarded that the defendant should gage deliverance, or else goe to prison. And *Bracton* is of the same opinion ; for he saith, *Eodem modo de viâ obstructâ, per breve quoddam justiciet propter communem utilitatem, ne transeuntes ire diu impediuntur, quia hoc esset commune damnum ; et in hoc vicecomes et justiciarii faciant sicut super detentionem averiorum contra vadium flegii, propter communem utilitatem, ne animalia diu inclusa pereant ;* which in mine opinion is an excellent point of learning.

(Post. 282. b. Dect.  
& Stud. 130. b.)

*Bracton*, lib. 4.  
fo. 283. a. & b.

28 E. 3. 92.  
3 H. 4. 12.  
34 H. 6. 37.  
3 E. 4. 23.  
(5. Co. 19. a.)

If the beasts of divers severall men be taken, they cannot joyne in a *repleg.* but every one must have a severall replevyn (2). And so in a replevyn it is a good plea to say, that the property is to the plaintife and to a stranger ; and where there be two plaintifes, that the property is to one of them.

Regist. fol. 133.  
*Bract.* fo. 121.  
& 154. W. 1.  
ca. 11. *Fleta*,  
lib. 2. ca. 2.  
F. N. B. 66. b.

There is also a writ *de homine replegiando*. But *Littleton* is ready to give you further instruction : therefore heare him.

“ *Et avowat le prise, &c. en court de record.*” Here it appeareth, that an avowry in a court of record, which is in nature of an action, is a determination of his election before any judgement given (3). And this is a good proofe of that, which hath beene formerly said of the writs of annuity and assise (4).

31 H. 6. 24.  
per *Newton*.  
27 H. 6. 4.

*Electio semel facta et placitum testatum non patitur regressum. Quod semel placuit in electionibus amplius displicere non potest.* [146. a.]

If a rent charge be granted to *A.* and *B.* and their heires ; *A.* distreyneth the beasts of the grantor, and he sueth a replevin ; *A.* avoweth for himselfe, and maketh conusance for *B.* ; *A.* dyeth and *B.* surviveth : *B.* shall not have a writ of annuity ; for in that case, the election and avowry for the rent of *A.* barreth *B.* of any election to make it an annuity, albeit he assented not to the avowry.

(2. Co. 36. b.)

But here is another diversity to be observed betweene the case aforesaid of the grant of the rent where he (as hath beene said) may make it either reall or personall, and when a man may have election to have severall remedies for a thing that is meerly personall or meerly

(1) [See Note 239.]

(2) [See Note 240.]

(3) Acc. post. 268. a. F. N. B. 152. A.

(4) See ante 145. a.

meerly reall from the beginning. As if a man may have an action of account or an action of debt at his pleasure, and he bringeth an action of account and appeare to it, and after is nonsuite, yet may he have an action of debt afterwards; because both actions charge the person. The like law is of an assise, and of a writ of entry in the nature of an assise, and the like.

23 E. 3. 33. h.  
27 E. 3. 89. h.  
(5. Co. 7. a.  
Ant. 139. a.)

## Sect. 220.

**I**TEM, si homo volet quod unus alius haberet unum rentum charge issuant hors de sa terre, mes il ne volet que sa person soit chargee en aucun maner per briefed d'annuitie, donques il poit aver tiel clause en la fine de son fait: Proviso semper, quod presens scriptum, non aliquid in eo specificatum, non aliquid se extendat ad onerandum personam meam per breve vel actionem de annuitate, sed tantummodo ad onerandum terras et teneamenta mea de annuali redditu predicti, &c. (1) Donques la terre est chargee, et le person del grantor dischargee.

**A**LSO, if a man would that another should have a rent charge issuing out of his land, but would not that his person be charged in any manner by a writ of annuity, then hee may have such a clause in the end of his deed: *Provided alwaies, that this present writing, nor any thing therein specified, shall any way extend to charge my person by a writ or an action of annuity, but only to charge my lands and teneaments with the yearly rent foresaid, &c.* Then the land is charged, and the person of the grantor discharged.

**B**Y this Section it appeareth, that when in a generall grant the law doth give two remedies, that the grantor may provide that the grantee shall not use one of them and leave the party to the other (2). But where the grantee hath but one remedy, there that remedy cannot be barred by any proviso; for such a proviso should be repugnant to the grant.

28 H. 6. Dier.  
9. b.  
(Hob. 78.)

“*De annuali redditu, &c.*” Here by (*&c.*) and the consequent of this Section bee implied divers excellent points of learning, viz. If a man by his deede granteth a rent charge out of the mannour of Dale (wherein the grantor hath nothing) with such a proviso that it shall not charge his person; albeit the repugnance doth not appeare in the deed, yet the proviso taketh away the whole effect of the grant, and therefore is in judgement of law repugnant; for upon the matter it is but a grant of an annuity, provided that it shall not charge his person (3). For which cause our author putteth his case of a rent charge issuing truly out of land. But if a man by his deed grant a rent charge out of land, provided that it shall not charge the land, albeit the grantee hath a double remedy, as hath beene said, yet the proviso is repugnant; because the land is expressly charged with the rent, but the writ of annuity is but implied in the grant, and therefore that may bee restrained without any repugnance, and sufficient remedy left for the grantee; for which cause our author putteth his case of the restraint of bringing a writ of annuity.

(1 Ro. Abr. 327.  
Hutt. 33.)

So it was resolved  
by the justices in  
11 H. 3. as Justice  
Spilman reporteth.  
9 Il. d. 53.

And

(1) For the operation of this sort of proviso, see Dy. 222. a. and 2. Co. 72. a.

(2) See post. 286. a. & b. 393. a.

(3) Acc. in Brediman's case, 4 Co. 58. b.

6 Eliz. Dier 237.  
(4. Co. 40. a.  
7 Co. 39. b.  
6 Co. 41. b.  
Post. 103. a.)

And yet in some cases where there is a proviso in the deed that the grantee shall not in any sort charge the person of [146. b.] the grantor generally, notwithstanding the person of the grantor shall be charged. As if a man grant a rent charge out of certaine lands to another for life, with such a *proviso*; the rent is behinde; the grantee dyeth; the executors of the grantee shall have an action of debt against the grantor, and charge his person for the arrerages in the life of the grantee; because the executors have no other remedy against the grantor for the arrerages; for distreine they cannot, because the estate in the rent is determined, and the proviso cannot leave the executors without remedy, as appeareth by that which hath beene said. (1). And therefore our author putteth his case of a rent charge continuing. And here is to be observed, that this word (*proviso*) hath divers operations. Sometime it worketh a qualification or limitation, and so it is taken here, and often in our bookes; sometime a condition; and sometime a covenant: whereof you shall reade more hereafter, Sect. 320.

(Post. 303. b.  
3 Co. 73. a.)

32 Am. p. 1.  
Vide Sect. 364.  
(Cro. Eliz. 237.  
1 Ro. Abr. 490.  
Mo. 811.)

"*En le fine de son fait.*" Here Littleton putteth his case of one deed. But though the grant be generall, and want such a proviso, yet may the grantee by another deed by way of defeasance grant, that he shall not charge the person of the grantor, and that if hee bring a writ of annuity, that the rent shall cease.

"*Nec aliquid in eo specificatum, non aliquamiter se extendat, &c.*" Here is to be observed a double negative, *nec*, and *non*, which in grammaticall construction amounteth to an affirmative; for *Negatio destruit negationem, et ambo faciunt affirmativum*. Yet the law, that principally respecteth substance, doth judge the proviso to be a negative according to the intent of the parties, and not according to grammaticall construction, to the end the proviso may take effect; and the like you shall finde hereafter in Littleton. \* *Mala grammatica non vitiat cartam*. Here our author putteth his case of one grantor. Put then the case, that *A.* and *B.* being joyn-tenants of lands in fee by their deed grant a rent charge out of those lands, provided that the grantee shall not charge the person of *A.* in this case if the grantee bringeth a writ of annuity, he must charge the person of *B.* only.

\* Lib. 3. cap.  
de Condict.  
Sect. 302.  
(10 Co. 139. a.  
Hob. 191. Cro.  
Cha. 555.)

## Sect. 221.

**I**TEM, si home fait tiel fait en tiel maner, que si *A.* de *B.* ne soit annuellement pay al feast de Noel pur terme de sa vie xx. s. de loyal mony, que adonques bien lirroit a meme cestuy *A.* de *B.* a distreiner pur ceo en le manor de *F.* &c. ceo est bone rent charge; pur ceo que le manor est charge

**A**LSO, if one make a deed in this manner, that if *A.* of *B.* be not yearly payed at the feast of Christmasse for terme of his life xx. s. of lawfull money, that then it shall be lawfull for the said *A.* of *B.* to distreine for this in the manor of *F.* &c. this is a good rent charge; because

(1) [See Note 241.]

*charge oue le rent per voy de distres (8) ; et encore la person de celui, que fait tiel fait, est discharge en tiel case de action d'annuitie, pur ceo que il ne granta per son fait aucun annuitie a le dit A. de B. mes granta tantsolement, qu'il poit distreiner pur tiel annuitie, &c.*

because the mannor is charged with the rent by way of distresse; and yet the person of him, which makes such deed, is discharged in this case of an action of annuitie, because he doth not grant by his deed any annuitie to the said A. of B. but granteth only, that he may distreine for such annuitie, &c.

“**Q**UE si A. de B.” Here [want] words to precede these, viz. *que il grant al A. de B. &c. que si A. de B. &c.* as it appeareth in the originall (2); and so it appeareth in the close of this Section, viz. *mes granta tantsolement que il poet distreyner.* And without such a grant the clause should be imperfect.

(2. Re. Abr. 424.)

“*Pur ceo que le mannor est charge oue le rent per voye de distresse.*” And yet no rent is expresly granted out of the mannor. But, by the grant that he shall distreine for such a yearly summe of money, in judgement of law the mannor is charged with the rent; but the person of the grantor cannot be charged, because he expresly granteth no rent, for that would charge his person; but that the grantee should distreine, &c. which only chargeth the Mnd.

(Plowd. 189.)

[147. a.] “*Que il poet distreyner pur tiel annuity, &c.*”

Here by (&c.) many points worthy of observation are implied, viz. if a man seised of lands in fee bindeth his goods and lands to the payment of a yearly rent to A. de B. this is a good rent charge with power to distreine, albeit there be no expresse words of charge, nor to distreine. Or in these words, *Obligo manerium meum de C. et omnia bona in dicto manerio existent' A. de B. in annuo redditu de xx. s. ad distringend' per balivum domini regis pro redditu predicto.* By this grant a rent charge issueth out of the mannor; and where the words be, *ad distringendum per balivum domini regis*, this is for the advantage of the grantee. And therefore the king's bailly should be but his minister to distreine for his rent; and that which he may doe by his servant, he may doe by himselfe or by any other of his servants (2).

18 Ass. p. 1.  
18 E. 3. 32.  
3 Ass. 7.  
3 E. 3. 12.  
10 Ass. 24.  
31 Ass. p. 17.  
33 Ass. (1)  
Annuity 52.  
16 E. 3. grant 64.

If a man by deed, grant a rent of forty shillings to another out of his mannor of Dale, to have and to perceive to him and his heirs, and grant over by the same deed, that if the rent be behind, that the grantee shall distreine in the mannor of Sale (be the mannor of Sale in the same county or in another county, and bee this grant by one deed or divers deeds), the rent is onely issuing out of the mannor of D. and it is but a paine that he shall distreine in the mannor of S.; but both the mannors are charged, the one with the rent, and the other with a distresse for the rent; the one issuing out of the land, and the other to be taken upon the land. And whereas our author puts his case of a grant for life; so it is if I grant to you, that you and your heires, or the heires of your body, shall

7 Co. 23, 24. in Butts his case.

(2) The words, here stated by lord Coke to be in the original, are not in L. and M. nor Roh.

(3) In L. and M. and in Roh. &c. is added.

[147. a.]

(1) Instead of Ass. it should be E. 3.

(3) What follows on this side of the folio is taken almost verbatim from Butts's case, in 7. Co. 23. a.

shall distreine for a rent of forty shillings within my mannor of *S.* this by construction in law shall amount to a grant of a rent out of my mannor of *S.* in fee simple or fee taile; for if this shall not amount to a grant of a rent, the grant shall be of little force or effect, if the grantee shall have but a bare distresse and no rent in him; for then he shall never have an assise of this, &c. And this is the reason, that it is so often ruled and resolved,\* that this amounts to a grant of a rent *per* construction of law, *ut res magis valeat.* And all this is necessarily implied in the (*Uc.*) and in this case the grantee shall not have a writ of annuity, as our author saith. And whereas our author putteth his case where the distresse is to be taken in the same land out of which the rent by construction of law is issuing, hereby is implied, that if a rent be granted out of the mannor of *D.* and the grantor grant over, that if the rent be behinde, the grantee shall distreine for the same rent in the mannor of *S.* this is but a penalty in the mannor of *S.* for three causes.

First, the law needs not to make construction that this shall amount to a grant of a rent, for here a rent is expresly granted to be issuing out of the mannor of *D.* and the parties have expressly limited out of what land the rent shall issue, and upon what land the distresse shall be taken, and the law will not make an exposition against the expresse words and intention of the parties, which this way stands with the rule of the law. *Quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba expressa fienda est.*

Secondly, if in this case this shall amount to a grant of a rent out of the mannor of *S.* then the grantor shall be twice charged. For if the grantee bringeth a writ of annuity, this shall extend onely to the mannor of *D.*; for upon the grant of a distresse in the mannor of *S.* no writ of annuity lyeth, because the mannor of *S.* is onely charged, and not the person of the grantor as to this (3); and for this cause the bringing of the writ of annuity cannot discharge the mannor of *S.* of any rent; and so the law by construction against the words and the intention of the parties shall doe injury to the grantor to charge him twice.

Thirdly, if in such case the mannor of *S.* in which the distresse is onely limited, shall be in another county, then it hath beene often adjudged, that the rent shall not issue out of the same, but the distresse shall be as a meane and remedy to compell the tenant of the land to pay the rent. And it was said, that there was no diversity in reason, that the law in construction shall make the rent to be issuing out of this, when it lyeth in the same county, and not when it lyeth in severall counties; for the words in both cases are all one, and there is no reason to say that he shall faile of a recovery by assise (4). And the bookes in 1. *Ass. p.* 10. and 1 E. 3. 21. and other bookes doe not say that the rent issueth in this case out of both, but that the land in which the distresse shall be taken is charged; and this is true, for it is charged with the distresse. And inasmuch as it was charged with the distresse, their opinion was, that the tenants of both of them shall be named in the assise. And the opinion of *Finchden*, in 41 E. 3. 13, was affirmed to be good law, that if the mannor of *D.* out of which the rent is granted, be recovered by an elder title, that all the rent is extinct (5); but if the mannor

\* 3 E. 3. 19.  
3. Ass. p. 7.  
14 Ass. p. 14.  
16 E. 3. 6.  
Grants 64.  
18 E. 3. 32.  
20 Ass. 32.  
30 Ass. 12.  
46 E. 3. 16. 32.  
8 H. 4. 19.  
9 H. 4. 9.  
22 H. 4. 11.  
(3 Co. 54.  
Foot. 213.)

Vide Bulwar's  
case. 7. Co. 3.  
1. Ass. p. 10.  
1 E. 3. 21.  
Vide 9. E. 3. 13.  
11 Ass. 27.  
17 E. 4. 6.  
10. Ass. 4.  
10 E. 3. 16.  
3 E. 3. Ass. 369.  
1 Ass. 10.  
3. Ass. 7.  
22 H. 6. 27.  
22. Ass. 66.  
31 Ass. 27.  
20 E. 3.  
Assise 366.  
41 E. 3. 13.  
per Finchden.

(3). Ass. ant. 146. b.

(4) [See Note 242.]

(5) [See Note 343.]



of *S.* in which the distresse is limited, be evicted, yet all the rent remains\*. So if the grantee purchase parcell of the manor of *S.* the rent is not extinct, for that the rent issueth onely out of the manor of *D.* (1). And it is said, that if a man grant a rent out of three acres, and grant over, that if the rent be behind, that he shall distreine for the rent in one of the acres, this rent is entire, and cannot be a rent secke out of two acres, and a rent charge out of the third acre, and therefore it is a rent secke for the whole; and yet hee shall distreine for this in the third acre. So if a rent be granted to two and to their heires out of an acre of land, and that it shall be lawfull for one of them and his heires to distreine for this in the same acre, this is a rent secke; for insomuch as they stand joyntly seised of one intire rent, it cannot be as to the one a rent secke, and as to the other a rent charge, and this distressee is as an appurtenant to the rent: and therefore if he which hath the rent dieth, the survivor shall distreine; and if both grant over the rent to another, he shall distreine for this. But if a man grant a rent out of Blacke Acre to one and to his heires, and grant to him that he may distreine for this in the same acre for terme of his life, this is a rent charge for his life, and a rent secke after, *diversis temporibus*. Otherwise it is if the distresse be limited for certaine yeares in the same land, there this remaines a rent secke intirely, for that the fee and the freehold is seck in such case.

If a man seised of lands in fee (2), and possessed of a terme for many yeares, grant a rent out of both for life in taile or in fee, with clause of distresse out of both, this rent being a freehold doth issue onely out of the freehold, and the lands in lease are onely charged with a distresse (3). But if he had granted the rent onely out of the lands in lease for terme of the life of the grantee, this had issued out of the terme, and the land had beene charged during the terme, if the grantee lived so long.

If a man be seised of twenty acres of land, and grant a rent of twenty shillings *percipiend' de quolibet acra terre mee*, (that is) out of every one acre of my land, this is a severall grant out of every severall acre, and the grantee shall have twenty pounds in all.

*A.* doth bargain and sell land to *B.* by indenture, and before inrolment they both grant a rent charge by deed to *C.* and after the indenture is inrolled: some have said, that this rent charge is avoided; for, say they, it was the grant of *A.* and by the inrolment it hath relation to the delivery, which (say they) shall avoid the grant, notwithstanding the confirmation of the other which had nothing in the land at that time. But the grant is good, and after the inrolment by the operation of the statute (4), it shall be the grant of *B.* and the confirmation of *A.* But if the deed had not beene inrolled, it had beene the grant of *A.* and the confirmation of *B.* and so *qudcunque via data* the grant is good (5).

\* Vid. 17 E. 4. 6. assemblie case. Vide Sect. prox. sequen.

(7. Co. 23.)

(Flowd. 234. b. 235. a.)

22 H. 6. 10. b.

(Cro. Cha. 110. 217. Cro. Jam. 52, 53.)

(1) See further as to extinguishment of rent, *infra*.

(2) The case here stated is Butt's case, 5. Co. 23.

(3) See post. 196. b. & 197. a.

(4) 27 H. 8. c. 16.

(5) See 1. Com. Dig. 544. where most of the authorities on the relation of the inrollment of a bargain and sale to its execution are referred to. See also post. 186. a. and Hynde's case, 4 Co. 71. a.

... of ... is ... and so the ... the same doc-

trine prevails as to conditions and appurtenant, and for a like reason. 215. a. Ante 122. a.  
(8) See post. Sect. 224. and fol. 184.

land for the same rent, this amounteth to a new grant of a rent in fee simple. (1)

But yet a rent charge by the act of the partie may in some case be apportioned. As if a man hath a rent charge of 20 shillings, he may release to the tenant of the land 10 shillings or more or lesse, and reserve part; (2) for the grantee dealeth onely with that which is his owne, viz. the rent, and dealeth not with the land, as in case of purchase of part. And so was it holden in the common place, *Hill*. 14 Eliz. which I myselfe heard and observed. So [c] if the grantee of an annuity or rent charge of 20 pound grant 10 pound parcell of the same annuity or rent charge, and the tenant attorne, hereby the annuity or rent charge is divided (3).

And [f] when the rent charge is extinguished by his purchase of part of the land, he shall never have a writ of annuitie; because it was by the grant a rent charge, and he hath discharged the land of the rent charge by his owne act by purchase of part. And therefore he cannot by writ of annuity discharge the land of the distresse, as *Littleton* hath before (4) said. But if the rent charge be determined by the act of God or of the law, yet the grantee may have a writ of annuity. As if tenant for another man's life by his deed grant a rent charge to one for 21 yeares, *cesty que vie* dieth the rent charge is determined; and yet the grantee may have during the yeares a writ of annuity for the arrerages incurred after the death of *cesty que vie*, because the rent charge did determine by the act of God and by the course of law. *Actus legis nulli facit injuriam*. The like law is, if the land out of which the rent charge is granted be recovered by an elder title, and thereby the rent charge is voyded, yet the grantee shall have a writ of annuity, for that the rent charge is avoyded by the course of law; and so it was holden in *Ward's* case above remembered against an opinion *obiter* in 9 H. 6. 42. a.

"*Car rent service en tiel case poet estre apportion.*" Whether this apportionment was at the common law, or by force of the statute of *quia emptores terrarum*, hath beene a question in our bookes. \*And it appeareth by *Littleton*, that it was so at the common law; for when he citeth any thing provided by any statute, he citeth the statute, as he hath done this very act before. (5) *Littleton* speaketh here indefinitely of rent service, and there be divers kindes of rent services which are not within that statute; and yet such rent services are apportionable by the common law. As if a man maketh a lease for life or yeares reserving a rent, and the lessee surrender part to the lessor, the rent shall be apportioned. So if the lessor recovereth part of the land in an action of waste, or entereth for a forfeiture in part, the rent shall be apportioned.

[g.] So likewise if the lessor granteth part of the reversion to a stranger, the rent shall be apportioned; for the rent is incident to the reversion. [h] So it is if tenant by knights service by his last will and testament in writing deviseth the reversion of two parts of the lands, the devisee shall have two parts of the rent.

Rot. 108. in communal banco inter Ewer & Moyle.

And

(1. Ro. Abr. 239.)  
Hill. 14 Eliz.

[c] 9 H. 6. 12.  
53. F. N. B.  
152. D. R.

[f] 14 E. 4. 4.  
23 E. 3. 10  
darrein case 51.  
7 H. 6.  
9 H. 6. 1.  
8 H. 7. 33.

Ward's case  
cited in 2. Co.  
in Hayward's case  
fo. 36.

9 H. 6. 42.

\* Brookes tit.  
Apportionment  
28. 18 E. 3. 40.  
23. Ass. 52.  
3. Ass. 18.  
18 E. 2.  
Avoerie 218.  
Vid. 6. Co. 1. 2.  
In Braerton's case.  
Vid. 8.  
Co. 109. 106. in  
Talbot's case.  
(1. Ro. Abr.  
234. Post. 214.)  
[g] 14 H. 8. 12.  
Vid. 8. Co. 79.  
in Wilde's case.  
Pasch. 39 Eliz.  
Rot. 233. So it was  
adjudged inter  
Collins and Har-  
ding.  
(13 Co. 47.)  
[h] Trin. 43 Eliz.  
Rot. 243. inter  
West & Laasch.  
& Hill. 43 Eliz.

(1) [See Note 244.]

(2) See acc. in the comment on Sect.  
537. post. fol. 305. a.

(3) [See Note 245.]

(4) [See Note 246.]

(5) Ant. Sect. 216.

And these cases are in mine opinion rightly adjudged against a sudden opinion in *Hill* 6. and 7 E. 6. reported by serjeant *Bendloe* to the contrary. Note, what inconvenience should follow, if by the severance of the reversion the rent should be extinct.

“*Purchase parcell de la terre.*” This is intended of a fee simple, for if there be a lord and tenant of 40 acres of land by fealty and 20 shillings rent [i], if the tenant maketh a [148. b.] gift in taile, or a lease for life or yeares, of parcell thereof to the lord, in this case the rent shall not be apportioned for any part, but the rent shall be suspended for the whole: for a rent service (saith *Littleton*) may be extinct for part, and apportioned for the rest; but a rent service cannot be suspended in part by the act of the partie, and in *case* for other (1) part. So it is if the lessor enter upon the lessee for life or yeares into part, and thereof disseise or put out the lessee, the rent is suspended in the whole and shall not be apportioned for any part. And where our bookes \* speake of an apportionment in case where the lessor enters upon the lessee in part, they are to be understood where the lessor enters lawfully, as upon a surrender, forfeiture, or such like, where the rent is lawfully extinct in part. And yet by act in law a rent service may be suspended in part, and in *case* for part. \*As when the gardian in chivalrie entreth into the land of his ward within age, now is the seigniorie suspended; but if the wife of the tenant be endowed of a third part of the tenancie, now shall she pay to the lord the third part of the rent. \*And so it is if the tenant give a part of the tenancie to the father of the lord in taile, the father dieth, and this descends to the lord; in this case by act in law the seigniorie is suspended in part and in *case* for part, and the same law is of a rent charge. (2)

Likewise a seigniorie may be suspended in part by the act of a stranger. \*As if two jointenants or coparceners be of a seigniorie, and one of them disseise the tenant of the land, the other joyntenant or coparcener shall distreine for his or her moitie.

Concerning the apportionment of rents, there is a difference betweene a grant of a rent, and a reservation of a rent: for [k] if a man be seised of two acres of land, of one in fee simple, and of another in taile, and by his deed grant a rent out of both in fee, in taile, for life, &c. and dieth, the land intailed is discharged, and the land in fee simple remains charged with the whole rent; for against his owne grant he shall not take advantage of the weakenesse of his owne estate in part. [l] But if he make a gift in taile, a lease for life or for yeares of both acres, reserving a rent, the donor or lessor dieth, the issue in taile avoydeth the gift or lease, the rent shall be apportioned; for seeing the rent is reserved out of and for the whole land, it is reason that when part is evicted by an elder title, that the donee or lessee should not be charged with the whole rent, but that it should be apportioned ratably according to the value of the land, as *Littleton* here saith.

[m] If a man grant a rent charge out of two acres, and after the grantee recovereth one of the acres against the grantor by a title paramount, the whole rent shall issue out of the other acre: but if the recoverie be by a faint title by covine, then the rent is extinct for the whole, because he claimeth under the grantor.

If

(1) [See Note 247.]

(2) [See Note 248.]

[i] 33 H. 8. tit.  
Extinguishment.  
Br. 48. 11 Ed. 3.  
Covinit 21.  
17 E. 3. 57. a.  
(Goldsch. 44.  
1. Ro. Abr. 334.  
9. Co. 136.  
1. Ro. Abr. 334.)

\* 31 E. 4. 20.  
9 E. 4. 1.  
7 H. 6. 20.  
4 H. 7. 6. b.  
11 E. 3. Covinit  
21.  
(1. Ro. Abr. 334.)  
\* 33 E. 3.  
Bower 138.

\* 30 Ass. p. 12.

\* 27 E. 3. 86.

[k] 15 H. 4. 17.  
17 Ed. 2.  
Dower 164.  
30 Ass. p. 12.

[l] 20 H. 6. 3.  
9 E. 4. 1. 2.  
35 H. 8.  
Dyer 25. 7 E. 6.  
Dyer 22. 9 E. 3.  
6 H. 4. 17.  
(1. Ro. Abr. 334.)

[m] Dost. &  
Scud. li. 2. c. 17.

If a man infeoffeth *B.* of one acre in fee upon condition, and *B.* being seised of another acre in fee granteth a rent out of both acres to the feoffor, who entreth into the one acre for the condition broken, the whole rent shall issue out of the other acre; because his title is paramount the (3) grant. But if a man maketh a lease for life of Blacke Acre and White Acre, reserving two shillings rent, upon condition that if the lessee doth such an act, &c. that then he shall have fee in Blacke Acre, the lessee performs the condition, albeit now by relation he hath the fee simple *ab initio*, yet shall the rent be apportioned, for that the reversion of one acre whereunto the rent was incident is gone from the lessor; and so note a diversitie between a rent in grosse and a rent incident to a reversion, concerning the apportionment thereof. And yet in some cases a rent charge shall not be wholly extinct, where the grantee claimeth from and under the grantor. As if *B.* maketh a lease of one acre for life to *A.* and *A.* is seised of another acre in fee, *A.* granteth a rent charge to *B.* out of both acres, and doth wast in the acre which he holdeth for life, *B.* recovereth in wast; the whole rent is not extinct, but shall be apportioned; and yet *B.* claimeth the one acre under *A.* And so it is if *A.* had made a feoffment in fee, and *B.* had entred for the forfeiture, the rent is to be apportioned, and is not wholly extinct; and the reason hereof is, for that it is a maxime of law, that no man shall take advantage of his owne wrong, *nullus commodum capere potest de injuriâ suâ propriâ*; (4) and therefore seeing the wast and forfeiture were committed by the act and wrong of the lessee, he shall not take advantage thereof to extinguish the whole rent; and the whole rent cannot issue onely out of the other acre, because the lessor hath the one acre under the estate of the lessee, and therefore it shall be apportioned. \*If the king give two acres of land of equall value to another in fee, fee taile, for life or yeares, reserving a rent of two shillings, and the one acre is evicted by a title paramount, the rent shall be apportioned.

\* Dyer Mich.  
7 & 8 Eliz.  
Manuscript.  
The case of Huntington's case.

*"Mes si un homme tient sa terre, &c. per service de render annuellement, &c. un chival, ou un esperon d'or, &c. si en tiel case le seignior purchase parcel de la terre, tiel service est ale. (5)*

Vid. F. N. B.  
234. b. Briele  
de onerando pro  
rata port.

[149. a.] "*Chival.*" Nota, in Latine *destrarius* is a great horse, or a horse of service, of the French word *destrier*; *halfredus* a horse to travell on (1), of the French word *halfrey*; and *runcinus* a nagge (you shall often read of them in records), it commeth of the Italian word *roncino*. But admit that parcell of the land holden by such entire service come to the lord by descent, whether shall the entire service wholly remaine, or be extinct? And it is holden, that in some cases it shall be extinct for the whole, as suit service, and such other entire annuall suit services. But if the service be to render yearly at such a feast a horse, or the like, and the tenant infeoffe the father of the lord of part, which descends, yet the feoffor shall hold by a horse, because the service was multiplied, and each of them, viz. the feoffor and the feoffee, held by a horse.

*A.* hath

Anno 6 R. L.  
Rot. 5. War.  
Bruerton's case.  
6. Co. 2.  
34. Ass. 15.  
35 H. 6. Exec.  
31 Pl. Com. 73.  
40 E. 3. 40.  
5 E. 2. tit.  
Arowrie 206.  
(2 Inst. 503.  
3. Co. 105.)

(3) See the case of dower, post. 150. a.

(4) [See Note 249.]

(5) [See Note 250.]

[149. a.]

(1) It is used in this sense in a writ in F. N. B. 93. L

*A.* hath common of pasture *sauns nombre*, in twenty acres of land, and tenne of those acres descend to *A.*: the common *sauns nombre* is entire and incertaine, and cannot be apportioned, but shall remaine. But if it had been a common certaine (as for ten beasts), in that case the common should be apportioned. And so it is of common of estovers, of turbarie, of pischarie, &c. And yet in none of these cases, the descent, which is an act in law, shall worke any wrong to the *terre-tenant*; for he shall have that which belongeth to him, for the act in law shall work no wrong (2).

F. N. B. 309.  
40 E. 3. 40.

If three joyntenants hold by an entire yearly rent, as of a horse, or of a graine of wheat, and the tenants cesse by two yeares, and the lord recover two parts of the land against two of them, and the third saves his part by tending of the rent, &c. and finding suretie; albeit the lord come to the two parts by lawfull recovery, grounded upon the default and wrong of the two joyntenants, yet shall the entire annuall rent be extinct (3).

Vid. Litt. cap.  
tenant in common  
71. b.  
6. Co. 1, 2.  
in Brerton's  
case. Litt. f. 49.  
11 H. 7. 12. b.  
24 H. 8.  
Tenures 83.  
Brookes,  
36 H. 6. 6.  
11 Ed. Dy. 386.  
36 E. 3.  
Avothris 93.

If the tenant holdeth by fealty and a bushell of wheat, or a pound of comyn, or of pepper, or such like, and the lord purchaseth part of the land, there shall be an apportionment, as well as if the rent were in money: and yet if the rent were by one graine of wheat, or one seed of comyn, or one pepper corne, by the purchase of part, the whole should be extinct. But if an entire service be *pro bono publico*, as knights service, castle gard, cornage, &c. for the defence of the realme, or to repaire a bridge or a way, to keepe a beacon, or to keepe the king's records, or for advancement of justice and peace, as to ayd the sherife, or to be constable of *England* (4), though the lord purchase part, the service (5) remains. So it is if the tenure be *pro opere devotionis sive pietatis*, as to find a preacher, or to provide the ornaments of such a church; or *pro opere charitatis*, as to marry a poore virgin, or to bind a poore boy apprentice, or to feed a poore man. And so note a diversity betweene these cases and entire services for the private benefit of the lord.

## Sect. 223.

**M**ES si une home tient sa terre d'un uuler, per homage fealtie et escuage, et per certaine rent, si le seignior purchase parcel de la terre, &c. en tiel cas le rent serra apportion, come est avant dit: mes uncore en cest case l'homage et fealty demurront entier a le seignior; car le seignior avra la homage et fealtie de son tenant pur le remnant de les terres et tenements tenus de luy, come il avoit adevant (1), pur ceo que tiels services ne sont pas annuall services, et ne poient estre apportion, mes l'escuage poit et serra apportion solonque l'af-ferance et rate de la terre, &c.

**B**UT if a man hold his land of another, by homage fealty and escuage, and certaine rent, if the lord purchase part of the land, &c. in this case the rent shall be apportioned, as is aforesaid: but yet in this case the homage and fealty abide entire to the lord; for the lord shall have the homage and fealty of his tenant for the rest of the lands and tenements holden of him, as hee had before, because that such services are not yearly services, and cannot be apportioned, but the escuage may and shall bee apportioned according to the quantitie and rate of the land, &c.

“PUB-

(2) This same maxim is cited and applied ant. fol. 148. a.

(3) [See Note 251.]

(4) See post. 163. a.

(5) Acc. post. 149. b.

(1) In L. and M. &c. is here added.

**PURCHASE** *parcel de la terre, &c.*" Here by this, (&c.) is implied that the reasons, wherefore homage and fealty remaine, and are not extinct in this case, are: First, because it can be no losse to the tenant, as it might in the case of an horse or other entire service; for there it may bee the remnant is not sufficient in value to pay it. Secondly, there is no land, but it must be holden by some service or other; and homage and fealty are the freest and least chargeable services to the tenant.

Bructon's case.  
ubi supra.  
(6 Co. 10.)

5 E. 2. Avowrie  
206.

(Plowd. 96. a.)  
Bructon's case.  
6 Co.  
Talbot's case  
8 Co. 104.  
8 H. 7. 11.  
(Post. 176. b.  
185. b.)

"*Pur ceo que tiel services ne sont passee annual services, &c.*" This is *ratio una*, but not *unica*, as it appeareth by that which [149. b.] hath beene said. If there be lord and tenant by fealtie and herriot service, and the lord purchase part of the land, the herriot service is extinct, (and yet it is not annuall, but to bee paid at the death of the tenant) because it is entire and valuable.

"*Selonque l'affectance et rate de la terre, &c.*" Here is by this (&c.) implied, that in some cases where it is entire and valuable, and not annuall, it shall not (as hath beene sayd) be extinguished by purchase of parts: \* as knights service, which is to be performed by the body of a man, if the lord purchase part, yet the tenure by knights service remains for the residue, *quia pro bono publico & pro defensione regni*; (2) but the escuage shall be apportioned, as here *Littleton* saith, because that is for the benefit of the lord, and yet it is casuall, and not annuall. And where our author speaketh of services, it is implied that a herriot custome, though it be entire, valuable, and not annuall, by the purchase of part shall not be extinct. On the other part, when the tenure is by an entire service, and the tenant aliens part of the tenancie, in what cases the rent shall be multiplyed, (that is) where the feoffor and the alienee shall pay the entire rent severally, (3) for regularly it holdeth, that *que in partes dividi nequeunt solida à singulis præstantur* and where not, you may read at large in my \* Reports.

\* 7 E. 3. 29.  
Talbot's case.  
8 Co. 104.

And by this (&c.) is also implied, that the apportionment shall not be according to the quantity of the land, but according to the quality or value thereof, (4) as by that which hath beene said appeareth.

\* Bructon's case.  
6 Co. 1. 2. Talbot's  
case  
8 Co. 104.

## Sect. 224.

**ITEM**, *si homo ad un rent charge, et son pier purchase parcel de les tenements charges en fee, et morust, et cel parcel descend a son firs, que ad le rent charge, ore cel (5) charge serra apportion selonque le value de la terre, come est avantdit de rent service; pur ceo que tiel portion de la terre purchase per la piere ne vient al firs*

**ALSO**, if a man hath a rent charge, and his father purchase parcell of the tenements charged in fee, and dieth, and this parcell descends to his sonne who hath the rent charge, now this charge shall be apportioned according to the value of the land, as is aforesaid of rent service; because such portion of the

(2) Acc. ant. 149. a.

(3) Ant. 67. b.

(4) Acc. infra, Sect. 224.

(5) The word *rent* is here inserted in L. & M.

*fits per son fait demesne, mes per  
discent et per course del ley.*

*fits per son fait demesne, mes per  
discent et per course del ley.* the land purchased by the father  
commeth not to the sonne by his  
owne fact, but by descent and by  
course of law.

S E. 2. Avowrie.  
200.  
21 E. 3. 58. b.  
34. Ass. 15. tit.  
Apportionment.  
b. 28. 9. Ass. 23.  
30 Ass. pl. 12

**N**OTE here a diversity, when the grantee of a rent charge commeth to a part of the land charged by his owne act, and when by the course of law. (6)

(Art. 142. b.)

*"Purchase parcel de les tenements charges en fee."* And so it is if the tenant giveth to the father of the grantee part of the land in taile, and this descend to the grantee, the rent shall be apportioned; and so by act in law a rent charge may bee suspended for one part, and in *case* for another.

34 E.C. 4. b.

And so it is, if the father be grantee of a rent, and the son purchase part of the land charged, and the father dieth after whose death the rent descends to the son, the rent shall be apportioned; and so it is if the grantee grant the rent to the tenant of the land, and to a stranger, the rent is extinct but for a moiety.

9 Aug 53.

If a man hath issue two daughters, and grant a rent charge out of his land to one of them, and dieth, the [150. a.] rent shall be apportioned; and if the grantee in this case enfeoffeith another of her part of the land, yet the moiety of the rent remaineth issuing out of her sister's part, because the part of the grantee in the land by the descent was discharged of the rent. But in all these cases where the rent charge is apportioned by act in law, yet the writ of annuity faileth; for if the grantee should bring a writ of annuity, he must ground it upon the grant by deed, and then must he, as it hath bene said, (1) bring it for the whole.

**§ 8. 2. Annuity**  
**21.**

*Annua nec debitum iudex non separat iñeum.*

**Fl. Com. 72.  
35 H. 6. tit.  
Execut. 21.  
14 B. 4. 5.**

Also in respect of the realty the rent is apportioned. But the personalty is indivisible, and by act in law shall not be divided. If execution be sued of body and lands upon a statute merchant or staple, and after the inheritance of part of those lands descend to the conusee, all the execution is avoided ; for the duty is personall, and cannot be divided by act in law (2).

"*Ne vient al fitz per son fait demeane, mes per discent & per course del ley.*" If the father within age purchase part of the land charged, and alieneth within age and dyeth, the sonne recovereth in a writ of *dum fuit infra etatem*, or entereth; in this case the act of law is mixt with the act of the party, and yet the rent shall be apportioned; for after the recovery or entry the sonne hath the land by discent.

So it is in case the sonne recovereth part of the land upon an alienation by his father *dum non fuit compos mentis*, the rent shall be apportioned for the cause aforesaid.

**S. E. 2. AVOIRY**  
**206.**

A man seised of lands in fee taketh a wife, and maketh a feoffment in fee, the feoffee grants a rent charge of x. pound out of the land

(6) Acc. ant. 147. b.

stances of the indivisibility of debts and personal duties, see F. N. B. 46 a. Kielw. 106. a. Bro. Nov. Cas. pl. 52. 135. Hett. 53. March. 56. 61.

[150. a.]

(1) Ant. 144. b. near the end.

(2) Acc: 2. Ventr. 327. For other in-



land to the feoffor and his wife and to the heires of the husband, the husband dieth, the wife recovereth the moiety of her dower by the custome; the rent charge shall be apportioned, and she may distreine for five pound, which is the moiety of the rent (3). In which case two notable things are to be observed. First, albeit the dower be by relation or fiction of law above the rent (4), yet when the wife recovereth her dower, she shall not have her entire rent out of the residue; for a relation or fiction of law shall never worke a wrong or charge to a third person, but *in fictione juris semper est equitas*. Secondly, that albeit her owne act doe concurrence with the act in law, yet the rent shall be apportioned.

3. Co. 39. in Butler and Baker's case.

## Sect. 225.

**I**TEM, si soit seignior et tenant, et le tenant tient de son seignior per fealty et certaine rent, et le seignior grantu le rent per son fait a un auler, &c. reservant a luy le fealty, et le tenant atturna al grantee de le rent, ore tiel rent est rent seck a le grantee; pur ceo que les tenements ne sont tenus del grantor (5) de le rent, mes sont tenus del seignior que reserve a luy fealtie.

**A**LSO, if there bee lord and tenant, and the tenant holds of his lord by fealty and certaine rent, and the lord grant the rent by his deed to another, &c. reserving the fealty to himselfe, and the tenant atturnes to the grantee of the rent, now this rent is rent seck to the grantee; because the tenements are not holden of the grantor of the rent, but are holden of the lord who reserved to him the fealtie.

**"ET le seignior grantu le rent, &c."** So it is if the lord release the rent of the tenant saving the fealty, the rent is extinct. But if there be lord and tenant by fealty and rent, and the lord by his deed reciting the tenure release all his right in the land saving his said rent, the seigniorie remaines, and he shall have the rent as a rent service, and the fealty incident to it; for the said rent is as much as to say the rent service whereunto fealty is incident.

12 E. 4. 11.  
9 E. 3. 1.  
40 E. 3. 22. b.  
13 E. 3. tit.  
Releases 36.  
(Post. 121. a.)

And if the lord hath issue two daughters and dieth, and upon partition the fealtie is allotted to the one and the rent to the other, she shall have the rent as a rent secke.

17 E. 3. 72. b.

If there be lord of a manor and tenant by fealty, suit of court and rent, the lord grants the fealty saving to him the suit of court and rent, the saving is good for the rent, but not for the suit of court;

17 E. 3. 72. b.

[150. b.] because the grantee can keepe no court, and there is no tenure of the grantor, and therefore the suit of court is lost and perished in that case.

If the donee hold of the donor by fealty and certaine rent, and the donor grant the services to another and the tenant atturne, some have said the rent shall not passe, because the rent cannot passe but as a rent service, being granted by the name of services; and the fealty

(3) This same case is cited and approved of in Ascough's case, 8. Co. 135. b.

(4) See the case of condition, ant. 148. b.

(5) Grantee instead of grantor in L. and M. and Roh. which is agreeable to the sense of the passage.

fealty cannot passe, because as hath beene saide (1) the fealty is incident inseparable to the reversion. But it seemeth, that the rent shall passe as a rent secke ; (2) because at the time of the grant it was a rent service in the grantor, and therefore there be words sufficient to passe it to the grantee, and it is not of necessity that it shall be a rent service in the hands of the grantee.

7 E. 2. b. Fitz.  
Warren's case.

If there be lord and tenant by fealty and certaine rent, and the lord by deed grant the rent in fee saving the fealty, and grant further by the same deed that the grantee may distreine for the same rent in the tenancy, albeit a distresse were incident to the rent in the hands of the grantor, and although a tenant attorne to the grant, yet cannot the grantee distreine ; for the distresse remains as an incident inseparable to the seignory, for then the tenant should be subject to two severall distresses of two severall men. (3) And so it is if the lord in that case grant the rent in tayle or for [his] life, saving the fealty, and further grant that the grantee may distreine for it, albeit the reversion of the rent be a rent service, yet the douce or grantee shall have it but as a rent secke, and shall not distreine for it.

7 E. 2. b. 3.  
Adjudged.

It is to bee observed, that where a rent service is become a rent secke by severance of the same from the seignory, that now the nature of the rent is changed; for if the grantee purchase part of the land, the whole rent shall be extinct. And whereas in an assise for a rent service, all the tenants of the land need not be named, but such as did the disseisin ; yet in assise for the rent seck, which sometimes was a rent service, all the tenants must be named, as in case of a rent charge, albeit he were disseised but by one sole tenant. \* But if the lord of a mannor release the fealty to his tenant saving the rent, or that a mesnalty become a rent by surplussage, (4) those that are now secke (and sometimes were service) are part of the mannor ; but a rent charge cannot be part of a mannor.

31 Ass. 51.  
17 Ass. 10.  
30 Ass. pl. 10.  
F. N. B. 172. b.  
22 H. 6. 2. b.  
4 E. 2. Ass. 440.  
20 H. 1. Dier 31.

\* 31 Ass. 28.  
23 Ass. 53.  
(Idem. 190.)  
1 Leon. 14.)

"Attorne, &c." Of attornement shall bee hereafter said in his proper chapter and place.

## Sect. 226.

*EN mesme le maner est, lou home tient sa terre per homage feultie et certaine rent, si le seignior grant la rent, savant a luy le homage, tiel rent apres tiel grant est rent secke. Mes la ou terres sont tenus per homage fealty et certeine rent, si le seignior voet grantier per son fait le homage de son tenant a un auter, savant a luy le remnant de les services, et le tenant atturna a luy selonque le forme del graunt ; en cest case le tenant tiendra sa terre del grantee, et le seignior que grantast le homage n'avera forsque le rent come rent secke, et ne unques*

**I**N the same manner, where a man holds his land by homage fealty and certaine rent, if the lord grant the rent, saving to him the homage, such rent after such grant is rent seck. But there where lands are holden by homage fealty and certaine rent, if the lord will grant by his deed the homage of his tenant to another, saving to him the remnant of his services, and the tenant attorne to him according to the forme of the grant ; in this case the tenant shall hold his land of the grantee, and the lord who granted the

(1) Ant. 143. a.

(2) See post. 152. a. the comment on Sect. 230. and note 6. there.

(3) [See Note 252.]

(4) [See Note 253.]

*unques distreynera pur le rent (1), pur ceo que homage ne fealtie ne escuage ne poit estre dit seck, car nul tiel service poit estre dit seck. Car celui, que ad ou doit aver homage ou fealtie ou escuage de sa terre, poit per common droit distreynen pur ceo s'il soit aderere; car homage fealtie et escuage sont services, per queux terres ou tenements sont tenus, &c. et sont tiels que en nul maner poient estre prises forsque come services, &c.*

the homage shall have but the rent as a rent seck, and shall never distrain for the rent, because that homage nor fealty nor escuage cannot be said secke, for no such service may be said secke. For he, which hath or ought to have homage fealty or escuage of his land, may by common right distreine for it, if it bee behind; for homage fealty and escuage are services, by which lands or tenements are holden, &c. and are such services as in no manner can be taken but as services, &c.

"**S***I le seignior voet granter per son fait le homage, &c.* It is to be observed, that where the seignior is by homage fealty and rent, [a] if the lord grant away the homage, the fealty shall passe; for fealty is an incident inseparable to homage [b], and cannot by any saving in any grant be separated from it, for homage cannot be sole or alone. But the rent (tho' it be not saved) shall not passe in that case; because the rent is not incident to homage; and so it is if there be lord and tenant by fealty and rent, and the lord grant over the fealty without any savings, the rent passeth not. But fealty hath an incident inseparable belonging to it, which by no saving can bee separated, and that is a distresse; for, as *Littleton* [151. a.] saith here, a service cannot be seck, (that is) without some distresse belonging to it, for then it were not a service, and so of homage and escuage.

"*Terres ou tenements sont tenus, &c.*" By this (&c.) and out of this Section it may be collected, that if [c] there bee lord and tenant by fealty and rent, the annuall rent, which is a profitable service, is of higher and more respect in law then the fealty; and therefore by the grant of the rent the fealty shall passe as an incident thereunto; but it is an incident separable, and therefore may be by a saving, as *Littleton* hath (2) said, separated from it. And so when the tenure is by fealty and rent, and the rent be recovered, the fealty shall includedly bee recovered. [d] And where the tenure is by homage fealty and rent, by the recovery of the rent with the appurtenances upon a former right, the homage and fealty also shall bee restored by necessity and indulgence of the law; for seeing the law giveth no *præcipe* for the homage and fealty, but for the rent only, reason would, that by the recovery of the rent the whole entire seignior shall be inclusively restored (3) in that case. But if the recovery be without title (4), there the rent is recovered as a rent seck, for that worketh no more than a grant;\* but by the recovery of a mannor, whether it be by title or without title, homage fealty and all other services parcell of the mannor are recovered.

[a] 40 E. 3. 22.  
per Curiam.  
[b] 44 E. 3. 19.  
20. 30 H. 6. 25.  
29 Am. p. 20.  
20 Am. p. 38.

[c] 44 E. 3. 19.  
20 Am. 38.  
29 Am. p. 20.  
9 E. 3. 5.  
30 H. 6. 24, 25;  
27 H. 8. 20.  
6 E. 4. 22.

[d] *Tempe H. 8.*  
*Br. tit. Incidents*  
24. 44 E. 3. 19.  
20. Am. 30.  
30 H. 6. 24, 25.

(Ant. 148. b.)  
\*Vide Sect. 149.

(1) In L. and M. here follow these words, viz. *pur ceo que fealtie ne poe estre severs de homage et.* But they are not in the Roh. edition.

(2) Sect. 225. fo. 150. a.

(3) [See Note 254.]

(4) [See Note 255.]

[c] 9 E. 3. 1.  
(Ant. 180. a.)

vered. And albeit fealty cannot bee divided from homage by grant (as hath beene said) yet by extinguishment it may [c]. As if there be lord and tenant by homage fealty and rent, and the lord release the seigniorie and services, or all his right in the land saving the fealty and rent, or saving the said rent, or if he by expresse words release the homage saving the fealty and rent, there the fealty and rent remain, for the homage is extinct. And so note a diversity betwene a grant and a release in that case. But so long as homage continues, the fealty cannot be divided from it.

“*Foraque come services, &c.*” Here is implied a diversity betwene these corporall services of homage fealty and escuage, which cannot become secke or dry, but make tenure whereunto distresses escheats and other profits be incident, and other corporall services, as to plough, repaire, attend, and the like, and all rents whatsoever, for they may become secke or dry and make no tenure.

## Sect. 227.

**M**ES auterment est de rent, que fuit un foits rent service; pur ceo que quant il est sever per le grant le seignior de les auters services, il ne poet estre dit rent service, pur ceo que il ne ad a ceo fealty, que est incident a chescun manner de rent service; et pur ceo est dit rent secke (1). Et le seignior ne poet grant tiel rent ove distresse, come est dit.

**B**UT otherwise it is of a rent, which was once rent service; because when it is severed by the grant of the lord from the other services, it cannot bee said rent service, for that it hath not fealty unto it, which is incident to every manner of rent service; and therefore it is called rent seck. And the lord cannot grant such a rent with a distresse, as it is said.

[f] 7 E. 3. 2. 3.  
[g] 7 E. 4. 11.  
3 E. 7. 4. 5.

“**E**T le seignior ne poet grant tiel rent ove distres, come est dit.” [f] For the distresse is an incident inseparable to the fealty, as hath been said [g], and therefore a release of distresse is void. [151. b.]

“*Incident.*” *Incidens*, a thing appertaining to or following another as a more worthy or principall; whereof you see here, and in divers other places of *Littleton*, examples. And of incidents, some be separable, and some inseparable (2), as hath beene said.

(1) The words which follow in this Section are not in L. and M. nor in the

Roh. edition; nor in the two MSS.

(2) [See Note 256.]

## Sect. 228.

**I**TEM, si home lessa a un autre terres pur terme de vie, reservant a luy certain rent, s'il grant le rent a un autre per son fait, savant a luy le reversion de la terre issint lesse, &c. tiel rent n'est forsque rent seck; pur ceo que le grantee n'ad riens en le reversion del terre, &c. Mes s'il grant le reversion del terre a un autre pur terme de vie, et le tenant attorne, &c. donques ad le grantee le rent come rent service; pur ceo que il ad le reversion pur terme de vie.

**A**LSO, if a man lett to another lands for tearme of life, reserv- ing to him certaine rent, if hee grant the rent to another by his deed, sav- ing to him the reversion of the land so letten, &c. such rent is but a rent seck; because that the grantee had nothing in the reversion of the land, &c. But if he grant the reversion of the land to another for tearme of life, and the tenant attorne, &c. then hath the grantee the rent as a rent service; for that he hath the reversion for tearme of life.

**"S**AVANT a luy le reversion, &c." By this word (&c.) is to be observed [A], that this rent reserved is a rent service, and hath fealty incident to it; and both rent and fealty are incident to the reversion, viz. [B] the rent incident to the reversion separably, but the fealty incident to the reversion inseparably; but by the grant of the rent, the fealty in this case shall not passe, because the fealty is inseparably incident to the reversion, but the grantee shall have the rent as a rent secke. Also by this (&c.) is implied an attornment of the tenant; for without that, although by the grant the rent is turned to a rent secke, so as the tenant cannot be charged with any distresse, yet to the passing thereof there must be an attornment.

[A] 41 E. 3. 16.

[B] 18 E. 4. 3.  
52 H. 1. de  
Patents. Br.  
26. Ass. 66.  
48 E. 3. 9. b.  
Doct. & Stud.  
11. 2. ca. 9.

**"Attorne, &c."** Here is implied by this (&c.) an attornment in the life of the grantee, and other incidents to an attornment, whereof you shall reade at large in the Chapter of Attornment (3).

**"Donques ad le grantee le rent comt rent service; pur ceo que il ad le reversion pur terme de vie."** And the reason hereof is, because the rent is incident to the reversion, as hath beene said, and (as Littleton saith here) passeth away by the grant of the reversion as with the superior, without saying *cum pertinentiis* (4) &c. for the reversion cannot be seck (5). But by the grant of the rent the reversion doth not passe (6).

(3) Post. 309. a.

(4) Acc. ant. 121. b. post. 307. a.

(5) [See Note 257.]

(6) See acc. from Littleton himself at the end of Sect. 229.

## Sect. 229.

[152. a.]

**E**T issint est a entendue, que si home dona terre ou tenements en le taile rendant a luy et a ses heires certaine rent, ou lessa terre pur terme de vie rendant certaine rent, s'il granta le reversion a un autre, &c. et le tenant atturna, tout le rent et service passe per cest parol (reversion) pur ceo que tiel rent et service en tiel cas sont incidents a le reversion, et passent per le grant de le reversion. Mes coment que il granta le rent a un autre, le reversion ne passa my per tiel grant, &c. (1)

**A**ND so it is to be intended, that if a man give lands or tenements in taile yeilding to him and to his heires a certaine rent, or letteth land for tearme of life rendring a certaine rent, if hee grant the reversion to another, &c. and the tenant attorne, all the rent and service passe by this word (reversion) (2) be- (Post. 324. a. b.) cause that such rent and service in such case are incident to the reversion, and passe by the grant of the reversion. But albeit that hee granteth the rent to another, the reversion doth not passe by such grant, &c. (3)

**T**HIS needs no explication, but is evident by that which hath formerly beene said, saving by this (&c.) in the end is implied the old rule, That the incident shall passe by the grant of the principall, but not the principall by the grant of the incident. *Accessorium non ducit, sed sequitur suum principale.* (4)

## Sect. 230. (5)

**I**SSINT nota le diversite. Et issint est tenuis P. 21 E. 4. Mes il est adjudge, an. 26. lib. assisarum, ou les services del tenant en taile fueront grants, que ceo fuit bone grant, nient obstant que le reversion demurt.

**S**O note the diversity. And so it is holden P. 21 E. 4. But it is adjudged 26. of the book of assises, where the services of tenant in taile were granted, that this was a good grant, notwithstanding that the reversion remaine.

**T**HIS is added to *Littleton*. And therefore as I have done heretofore, and shall doe hereafter in like cases, I passe it over. And the case here cited in 26. *Ass. p.* 66. was *contra opinionem multorum*; and afterwards that judgement was reversed by writ of error, for that the services remained with the reversion as incidents (6) inseparable.

(1) The same distinction between granting the reversion and granting the rent is taken post Sect. 572.

(2) According to Bro. Nouv. Cas. pl. 192. this holds in the case of the king as well as in the case of a common person.

(3) See ant. 150. b. & Ro. Abr. 59. & infra

note b.

(4) See ant. 151. a. note 3. and post. 349. b.

(5) No part of this Section is in L. & M. Rob. or P.

(6) [See Note 258.]

## Sect. 231.

**I**TEM, si soit seignior mesne et tenant, et le tenant tient del mesne per service de v. s. et le mesne tient ouster per service de xii. d. si le seignior paramont purchase le tenancie en fee, donques le service de le mesnaltie est extinct; pur ceo que quant le seignior paramont ad le tenancie, il tient de son seignior procheine paramont a luy, et s'il doit tener ceo de luy que fuit mesne, donques il tiendra un mesme tenancie immediate de divers seigniors per divers services, que serroit inconvenient, et la ley voit plus toft suffer un mischiefe que un inconvenience, et pur ceo le seigniorie del mesnaltie est extinct.

**A**LSO, if there bee lord mesne and tenant, and the tenant holdeth of the mesne by the service of five shillings, and the mesne holdeth over by the service of 12 pence, if the lord paramont purchase the tenancie in fee, then the service of the mesnalty is extinct; because that, when the lord paramont hath the tenancie, he holdeth of his lord next paramont to him, and if he should hold this of him which was mesne, then he should hold the same tenancie immediately of divers lords by divers services, which should be inconvenient, and the law will sooner suffer a mischief then an inconvenience, and therefore the seigniorie of the mesnalty is extinct.

**"S**i soit seignior mesne et tenant, &c. si le seignior paramont purchase le tenancie en fee, &c."

[152. b.] [k] Some have said, that in this case it were reason; that by the purchase of the lord paramount his seigniorie should be onely extinct, and that he should become tenant to the mesne, and the mesne to hold over as the lord paramount held. But that cannot bee; for that one man cannot be both lord and tenant, nor one land immediately holden of divers lords. [l] If the tenant infeoffe the lord paramount and his wife and their heires, in this case the mesnalty is but suspended; for if the wife survive, both mesnalty and seigniorie are revived.

It is said, that if there be lord mesne and tenant, each of them by fealty and sixe pence, the lord confirme the state of the tenant, to hold of him by fealty and three pence, that the mesnalty is extinct. (1) [m] And so in the same case, if the tenant bee an abbot, and the lord confirme his estate to hold of him in frankalmoigne, the mesnalty is (2) extinct. [n] So it is if the lord release to the tenant (3). For whether the lord purchase the tenancie, or the tenant the seigniorie, the mesnalty is extinct. And albeit the mesne grant the mesnalty for life, and then the lord release to the tenant, both the reversion and the estate for life are drowned. [o] So if there bee lord and tenant, and the tenant make a gift in taile, the remainder to the king, the seigniorie is extinct. (4)

**"Que serra inconvenient."** Here it appeareth, that *argumentum ab inconvenienti* is forcible in law, as hath beene said before, (5) and shall be often observed hereafter.

**"Le**

[k] 20 E. 3. avowrie, 136.  
3 E. 2. dt.  
Exting. 6.  
20 H. 4. ibid. 7.

[l] 7. Am. 2.  
7 E. 3. 20.

[m] 4 E. 3. 10.  
See for this hereafter in the chapter of Confirmation, Sect. (538.)  
[n] 3 H. 6. 24.  
(Post. 280. a.)

[o] 4 E. 3. P. & M. D., 145.  
(3 Co. 92. b.)

Vid. Sect. 134, 139.

(1) [See Note 259.]  
(2) [See Note 260.]  
(3) [See Note 261.]

(4) See Note 262.]  
(5) Ante 97. b.

[5] 12 H. 4. 3.  
40 Am. p. 27.  
12 H. 4.  
Fench. 21.

[5] "*Le ley voet plus tost suffer mischiefe que inconvenience.*"  
(6) *Lex citatis tolerare vult privatum damnum, quàm publicum ma-*  
*lum.* Here be two maxims of the common law.

First, that no man can hold one and the same land immediately of two severall lords.

Secondly, that one man cannot of the same land be both lord and tenant. And it is to be observed, that it is holden for an inconvenience, that any of the maxims of the law should be broken, though a private man suffer losse; for that by infringing of a maxime, not only a generall prejudice to many, but in the end a publike uncertainty and confusion to all would follow. And the rule of law is regularly true, *res inter alios acta alteri nocere non* (7) *debet, et factum unius alteri nocere non debet*; which are true with this exception, unlesse an inconvenience should follow, as our author here teacheth us.

## Sect. 232.

**M**ES entant que le tenant tenust del mesme per v. s. et le mesme tenust foreque per xii. d. issint que il avoit plus en advantage per iiii. s. que il payast a son seignior, il avera les ditz. iiii. s. come rent seck annuelment de le seignior que purchase le tenancie.

**B**UT in as much as the tenant holds of the mesme by five shillings, and the mesme hold but by twelve pence, so as he hath more in advantage by foure shillings, than he paies to his lord, he shall have the said foure shillings as a rent secke yearly of the lord which purchased the tenancie.

"**I**L avera le iiii. s. come rent secke."

And yet hee shall distreyn for it (1); for, seeing the fealtie is extinct, the law reserves the distresse to the [153. a.] rent; for as it hath been said in the like case, seeing the fealtie is extinct, the distresse by act in law may be preserved, *Quia quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non potest* (2). [5] And therefore if a man maketh a lease for life, reserving a rent, and bind himselfe in a statute, and [the conusee] (3) hath the rent extended and delivered to him, he shall distreyn for the rent (4), because he commeth to it by course of law.

[5] But if a rent service be made a rent secke by the grant of the lord, the grantee shall not distreyn for it, for that the distresse remains with the fealtie. [5] If there be lord meane and tenant, and the mesnaltie is a manor having divers freeholders, and the lord purchase one of the tenancies, and there is a rent by surpluseage this rent albeit it be changed into another nature (as hath beene said) is purcell of the manor. But yet by purchase of part of the land, the whole rent is extinct, albeit the law did preserve it.

[5] 12 H. 4.  
Avoyns 257.  
(Post. 264. b.  
Mo. 36.)

[5] 20 H. 3. 63.  
(Ant. 150. b.  
191. b. 300. b.)  
[5] 31 Am. 32.  
25 Am. 23.  
3 H. 6. 14.

(6) [See Note 263.]

(7) [See Note 264.]

[153. a.]

(1) [See Note 265.]

(2) See same maxim ant. fol. 56. a. See

also 11 Co. 52. a. Cro. Jam. 170. 189.  
and Olefield's case, Noy 123.

(3) The words [the conusee] are not in the original, but are added by the editor as essential to the sense of the passage.

(4) [See Note 266.]



## Sect. 233.

**I**TEM, si home, que ad rent seck, est un foits seisi d'aucun parcel de le rent, et apres le tenant ne voyt payer le rent aderece, ceo est son remedie. Il covient de aler per luy ou per autres a les terres ou tenements dont le rent est issuant et la demander les arerages del rent; et si le tenant denia ceo de payer, cest denier est un disseisin de le rent. Auxy, si le tenant ne soit adonques prist a payer, ceo est un denier, que est un disseisin de rent. (5) Auxy, si le tenant, ne nul auter home, soit demurrant sur les terres ou les tenements pur payer le rent quaut il demand les arerages, ceo est un denier en ley, et un disseisin en fait, et de tiels disseisins il poit aver assise de novel disseisin envers le tenant, et recovers le seisin del rent, et ses arerages et ses dammages et les costages de son brece et de son plea, &c. Et si apres tiel recovery [et execution ewe] (1) † le rent soit auter foits a luy denie, donque il avera un redisseisin, et recoversa ses double dammages, &c.

rent be againe denied unto him, then he shall have a redisseisin, and shall recover his double dammages, &c.

**A**LSO, if a man which hath a rent secke, be once seised of any parcell of the rent, and after the tenant will not pay the rent behind, this is his remedie. Hee ought to goe by himselfe or by others to the lands or tenements out of which the rent is issuing, and there demand the arerages of the rent; and if the tenant denie to pay it, this deniall is a disseisin of the rent. Also, if the tenant be not then readie to pay it, this is a denial, which is a disseisin of the rent. Also, if the tenant, nor any other man, be remaining upon the lands or tenements to pay the rent when he demandeth the arrearages, this is a deniall in law, and a disseisin in deed, and of such disseisins he may have an assise of novel disseisin against the tenant, and shall recover the seisin of the rent, and his arerages and his dammages, and the costs of his writ and of his plea, &c. And if after such recovery and execution had, the

“**SEISIN**,” or *seison*, is common aswel to the English, as to the French, and signifies in the common law possession, whereof *seisina* a Latin word is made, and *seisire* a verbe. (Ant. 20. a.)

“*D'aucun parcel*.” [u] A seisin of parcel is a sufficient seisin in law, to have an assise of the whole rent.

Concerning the generall learning of seisins, you may reade *lib. 4. Bevil's case, fol. 8. lib. 5. fol. 98. lib. 6. fol. 57. lib. 7. fol. 24. 29. lib. 9. fol. 33.* and many authorities of law there cited, but sufficient is said here to explaine *Littleton*.

“*A les terres, &c.*” [w] For a demand of the tenant out of the land is not sufficient: but if there be a house and land a demand on the land is sufficient; but for a condition broken, it ought to be at the house (6), as hath beene said before (7).

[u] 5 E. 4. 2.  
(Fost. 315. a.  
Cro. Cha. 307.)  
(9. Co. 33.)  
T. 18 E. 1.  
coram rege Nott.  
in Thesaur.

[w] 40 E. 3.  
14. b. 14 E. 4. 4.  
Pl. Com. 71.

“*Arere*.” This word *arere* is to bee observed, for it is not necessary, that the grantee of the rent should demand it at the

[153. b.]

(5) The words *de rent* not in L. and M. nor Roh.

(6) Acc. F. N. B. 179. A.

(7) Acc. post. 201. b.

(1) † The words between brackets not in L. and M. Roh. nor P.

(Ass. 144. a.)

[x] 26. Ass. 51.  
 5 H. 6. 11.  
 Lib. de Entris  
 79. b.  
 (2. Co. 56.  
 7. Co. 58.  
 1. Leon. 305.  
 Cro. Jam. 9, 10.  
 145.)  
 [y] Mich.  
 41 H. 3. coram  
 rege adjudge  
 accordingly.

the very time when it becommeth due, but at any time after it is sufficient. For this is not like a demand of a rent upon a condition; because that is penall and overthroweth the whole state; and [x] therefore the time of demand must be certaine, to the end the lessee, donee, or feoffee may be there to pay the rent (2). But a demand of a rent secke or rent charge is but onely a formal meane to recover, that which is due; [y] and therefore in that case it may be demanded after it is behinde at any time, whether the tenant be present or no, for remedies for rights are ever favourably extended.

"*Ceo est un denier en ley.*" For wheresoever there is a lawfull demand of a rent, and the same is not paid, whether the tenant be present or absent, yet this is a deniall in law, (3) albeit there be no words of denyall. It appeareth here, that the demand must be made upon the land, and albeit the tenant nor any for him be there, yet must the grantee demand it, because without a demand there can be no denier in deed, or in law.

(Post. 201. b.)

[z] Vid. Bract.  
 lib. 4. fol. 161,  
 162. 264.  
 Brit. ca. 42, 43,  
 44. f. 63. 106.  
 114, 119. 119.  
 Mirr. ca. 2. sect. 1.  
 \* Fleta lib. 4.  
 ca. 1. Bra. ubi  
 supra.  
 (4. Leon. 48. a.  
 Cro. Cha. 303.)

"*Disseisin.*" (4) [z] *Disseisina* is a putting out of a man out of seisin, and ever implyeth a wrong. (5) But dispossessing or ejectment is a putting out of possession, and may bee by right or by wrong. \* *Omnis disseisina est transgressio, sed non omnis transgressio est disseisina. Sico animo forte ingrediatur fundum alienum, non quod sibi usurpet tenementum vel jura, non facit disseisinam sed transgressionem, &c. Querendum est à iudice quo animo hoc fecerit, &c.* (6) And of ancient time a disseisin was defined thus: *Disseisin est un personel trespasse de tortious ouster del seisin.* (7)

Mirr. ca. 2. sect.  
 25. Bracton  
 lib. 4. ca. 4.  
 Britton ca. 44,  
 45, &c. Fleta  
 lib. 4. ca. 5, &  
 6. & 3.

Mirror ca. 2.  
 sect. 25.

"*Assise de novel disseisin,*" *Assise nova disseisina.* *Assise* properly commeth of the Latin word *assideo*, which is to associate or set together; so as properly assise is an association or sitting together. And the writ, whereby certain persons are authorised and called together, is called *assise nova disseisina*; so as *assise* is but *cessio* (8). But because *cessio* is but a generall word, therefore in this sense *assise* is used in law for a particular cession by force of the writ *de assise nova disseisina*; and accordingly it was anciently said, *assise in un case n'est auter chose que cession des justices.* And it is called *assise nova disseisina*, for that the justices of eire, before whom these assises were taken in their proper counties, did ride their circuits from 7 years to 7 years, and no disseisin before the eire if it were not complained of in the eire could be questioned after the eire; and therefore a disseisin committed before the last eire was called an ancient disseisin, and a disseisin after the last eire was called a new disseisin, or *nova disseisina*. *Assise* also signifieth a jury, of their sitting together, and also a session of parliament, as *Littleton* hereafter in this Chapter sheweth.

(7. Co. 3. b.)

"*Et recovers le seisin del rent.*" Here, and by the (&c.) in the end of this Section is implied, that our author intendeth his case where

(2) [See Note 267.]

(3) For disseisin of rent by denial see post. Sect. 238.

(4) See Littleton's description of disseisin, post. Sect. 279.

(5) It also implieth force. Post. 257. b.

(6) The preceding passages in Latin are not from Bracton or Fleta in the places cited by lord Coke, but from Bract. 216. b.

(7) [See Note 268.]

(8) It should be *sessio*, the word as Coke spells it tending to a wrong derivation.

where the rent issueth out of lands in one county. For if a man be seised of two acres of land in two severall counties, and maketh a lease of both of them reserving two shillings rent; in this case, albeit severall liveries (9) be made at severall times, yet is it but one entire rent in respect of the necessitie of the case, and he shall distreine in one county for the whole, and make one avowrie for the whole. But he shall have severall assises *in confinio comitatûs*, and

[154. a.] in either countie shall make his plaint of the whole rent; but there shall be but one patent to the justices. [a] And this assise in *confinio comitatûs* is given by the statute of 7 R. 2. cap. 10. for no assise lay in that case at the common law, but the party might distreine. [b] But for a common of pasture, of turbary, of piscary, of estovers, and the like, in one county, appendant or appurtenant to land in another county, an assise *in confinio comitatûs* did lye at the common law; [c] and so it is of a nusans done in one county to lands, lying in another county, the like assise did lye at the common law.

[d] And albeit the counties do not adjoyne, but there be 20 counties meane betweene them, yet the assise *in confinio comitatûs* doth lye (1), and the justices shall sit betweene the said counties. [e] And where it is said before of two counties, the like law it is if the same extend into more counties (2).

[f] If a man hold divers mannors or lands in divers severall counties by one tenure, and the lord is deforced of his services, he shall have severall writs of customes and services; for every county one writ returnable at one day in the court of common pleas, and thereupon count according to his case by the common law.

[g] But if the tenant in that case doe cease, the lord shall not have severall writs of *cessavit ut supra*; for the writ of *cessavit* is given by statute,\* and the forme and manner of the writ therein prescribed; and thereupon it is holden in our bookes that in that case a *cessavit* doth not lye. (3)

[h] "*Il avera un redisseisin & recovers ses double damages, &c.*" Here by this (*&c.*) is also to be understood, that a writ of redisseisin is given by the statute of Merton\* (so called because the parliament was holden at Merton in Anno 20 H. 3. the letter whereof is, *Item si quis fuerit disseisitus de libero tenemento, & coram justiciariis itinerantibus scisinam suam recuperaverit per assisam novæ disseisine, vel per recognitionem eorum qui fecerint disseisinam, & ipse disseisitus per vicecomitem scisinam suam habuerit, si iidem disseisitores, postea post iter justiciariorum, vel infra, de eodem tenemento iterum eundem conquerentem disseisiverint, & inde convicti fuerint, statim capiuntur, &c.* (4) But the double damages are given by the statute of W. 2. cap. 26. (5)

And

(9) As to livery of lands situate in several counties, see ant. Sect. 61, 62.

[154. a.]

(1) Acc. Finc. Descript. del Com. L. 59. a.

& 49. Ass. pl. 1. & 21 Hen. 6. 3. there cited.

(2) [See Note 269.]

(3) Acc. F. N. B. 209. K.

(4) Acc. 2. Inst. 82. 115.

(5) Sec 2. Inst. 416.

[a] 10 Ass. pl. 4. 18. Ass. pl. 1. & 18 E. 3. 32. 22 H. 6. 9, 10.

[b] F. N. B. 180. a. (7. Co. 2. 3, 4.)

[c] F. N. B. 18 3. k.

[d] 8 E. 4. 2.

[e] F. N. B. 180. a.

[f] 30 E. 1. tit. Droit. F. N. B. 151. m.

[g] 18. Ass. pl. 1.

\*W. 2. cap. 21.

[h] Bracton fol. 234. Britton, 133. 346. Fict. li. 4. ca. 29. Merton cap. 3. Regist. 206, 207. \*Mirror ca. 3. W. 2. c. 46. Vid. Sect. 234.

Vide Regist. 206. b. (1. Ro. Abr. 571.)

And *Littleton* in few words hath made a good exposition of this statute; for where the statute saith, *disseisitus de libero tenemento*, *Littleton* expounds it [i] to extend to a rent secke or rent charge. (6) Albeit, as hath beene said, they be against common right, yet a man hath a freehold in them, [k] and he that granteth *omnia tenementa sua*, a rent charge or a rent secke doth passe. (7)

*Coram iudicialibus itinerantibus*, &c. saith the statute. But *Littleton* speaketh generally, and so is the statute to be intended before any other justices that have authority to take assises, and justices itinerant are set downe but for an example, which is worthy of the observation, [l] being a penall law.

*Recuperaverit per assisam*, &c. saith the statute. Here *assise* is taken for the verdict of the assise, as *Littleton* hereafter in this Chapter expoundeth the same. *Vel per recognitionem*, &c. or by confession. Then the question is, what if the recovery were upon a demurrer, or by pleading of a record and failer of it, or by any other manner. And seeing *Littleton* speaketh generally, it must be understood of all manner of recoveries in an assise of *novel disseisin*; and so it is confirmed by the statute of W. 2. cap. 26. (8)

"*Recoverie*." *Recuperatio* commeth of the verbe *recuperare*, i. e. *ad rem per injuriam extortam sive dententam per sententiam iudicis restitui*. And *recuperatio* in the common law is all one with *evictio* in the civill law, which is *alicujus rei in causam alterius abducta per iudicem acquisitio*.

"*Et execution owe*." *Per vicecomitem seisinam habuerit*, saith the statute: but *Littleton* speaketh generally; (*et execution owe*) and execution had; so as whether it bee by the sherie or by the party, so as execution or possession be had, it sufficeth. (9)

"*Execution*." *Executio*, and signifieth in law the obtaining of actuall possession of any thing acquired by judgement of law, or by a fine executory levied, whether it be by the sherie or by the entry of the party, whereof you shall reade more hereafter. (10)

Note, it appeareth here by *Littleton*, that [m] the recovery in a former writ must be in an assise of *novel disseisin*, wherein these words (*tiel recoverie*) are to be observed. And therefore in a writ of right close in ancient demesne, the demandant maketh his pro- testation to sue in the nature of assise of *novel disseisin*, and after is redisseised, hee shall not have a writ of redisseisin, because the first recovery was not by a writ of assise of *novel disseisin*. [n] And so it is, if the recovery were in assise of fresh force by bill according to the custome of some city or borrough. Also in ancient demesne there be no coroners. (11)

*Si idem disseisitores*, saith the statute. [o] So as it must be the same disseisors: but here *idem* is taken for *non alii*. And therefore if the recovery in the assise were against two disseisors, [154.b.] and one of them redisseise him againe, he shall have a redisseisin against him, for he is not *aliius*. But if the recovery had been against one,

[i] 40. Am. 23. ac.

[k] 14 E. 4. d.  
11 H. 6. 22.  
(Ant. c. a. 19, b.)[l] Fitz. N. B.  
160. b.

Vide Sect. 204.

[m] 14 E. 2.  
Ch. Bredon. 9.  
F. N. B. 189. g.[n] 14 E. 3.  
Ch. Bredon. 8.  
Vide the 2. part of  
the Instrum. Stat.  
de Merton, cap. 3.[o] 9 H. 4. s.  
F. N. B. 169. c.  
23. Am. pl. 7.  
(Cro. Jam. 334.)  
(F. N. B. 189. c.)

(6) Acc. F. N. B. 178. D.

(7) [See Note 270.]

(8) See further as to *redisseisin* Fitzher-  
bert's comment on the writ of that name,  
F. N. B. 189. B.(9) Acc. ant. 34. b. See also Dy. 278. b.  
March. 95.

(10) Post. 289. a.

(11) [See Note 271.] }

one, and he and another redisseise the plaintife, he shall not have a redisseisin; for here is *alius*; and he cannot have a redisseisin against the former disseisor alone, because he is jointenant with another; [h] for joyntenancy in a writ of redisseisin is a good plea, and a stranger shall not be subject to double imprisonment and double dammages.

[g] If a recovery be had against a woman in an assise of *novel disseisin*, and the plaintife recovereth and hath execution, the woman taketh husband, and both of them redisseise the plaintife, he shall not have a redisseisin, because the husband is *alius*. [r] And yet if a feme recover in an assise, and after take baron, and they are redisseised, the husband and wife shall have a redisseisin; because the husband joyneth for conformity, and it is in the right of his wife who was disseised before, so in effect it is *idem disseisitus & idem conquerens*. (1)

If two coparceners be disseised and recover in an assise, if after they make partition, and after they be severally disseised, they shall have severall redisseisins; and so it is of joyntenants; for they be *idem conquerentes, & non alii*. Also a redisseisin doth lye against the disseisor which doth redisseise, and against another to whom he made feoffment after the second disseisin; for otherwise the disseisor might prevent the plaintife of his redisseisin. But in an assise against *A.* and *B.* *A.* is found disseisor, and *B.* tenant, and the plaintife doth recover; and after he which was found tenant disseises the plaintife, he shall not have a redisseisin, because he did disseise him but once. (2)

*De eodem tenemento*, saith the statute. If the plaintife be redisseised of parcell of the tenement formerly recovered, he shall have a redisseisin.

If the mesne recovereth (3) a rent when it is a rent service, and after the rent becommeth a rent seck by surplusage, and doth redisseise him of the rent, he shall have a redisseisin; for the substance of the rent remaines, though the quality be altered. (4)

[s] If tenant in speciall taile recovereth in assise, and after becommeth tenant in taile after possibility of issue extinct, and then is redisseised, he shall have a redisseisin; for albeit the state of inheritance be altered, yet the same freehold remaineth. (5)

If a man recover land in an assise of *novel disseisin* whereunto there is a common appendant or appurtenant, and after is redisseised of the common, he shall have a redisseisin of the common, for it was tacitely recovered in the assise. (6)

(1) [See Note 272.]

(2) See post. Sect. 278.

(3) Recovery in *assise* must be understood.

(4) [See Note 273.]

(5) Acc. 11. Co. 81. *in* Lewis Bowles's case.

(6) Other instances of tacit recovery are mentioned ant. fol. 151. a.

[p] 33 E. 3.  
Redisseisin 7.  
3. Co. 13. b.  
Post. 198. a.)

[g] 9. H. 4. 5.  
F. N. B. 188. E.

[r] F. N. B. 188.  
E. Registr.  
9 H. 4. 5.

(Hob. 96.)

F. N. B. 188. G.

(Ant. 153. a.)

[s] 26 H. 6.  
tit. Aid. 77.

8 E. 3. tit.  
Redisseisin 6.  
F. N. B. 189. p.

## Sect. 234.

**E**T memorandum, que cest nosme assise est nomen æquivoecum; car ascun foits est prise pur un jurie; car le commencement de le record de assise de novel disseisin issint commencera: assisa venit recognitura, &c. quòd idem est quòd jurata venit recognitura, &c. Et la cause est, pur ceo que per le brieve de assise il est command a la vicont, quòd faceret duodecim liberos et legales homines de vicineto, &c. videre tenementum illud, & nomina illorum imbreviare, et quòd summoneat eos per bonos summonitores, quòd sint coram justiciariis, &c. parati inde facere recognitionem, &c. Et pur ceo que, per tiel original, un pannel per force de mesme le brieve devoit estre returne, &c. il est dit en le commencement del record en le assise, assisa venit recognitura, &c. Auxy, en brieve de droit il est communement dit, que le tenant luy poit mitter en Dieu et grand assise, &c. Auxy, il y ad un brieve en le register, que est appel brieve de magna assisa eligenda. Issint est ceo bien proce, que cest nosme assise aliquando ponitur pro jurat'. Et ascun foits il est prise pur tout le brieve d'assise; et solongue cel entent il est plus properment et plus communement prise, sicome assise de novel disseisin est prise pur tout le brece de assise de novel disseisin. Et en mesme le maner assise de common de pasture est prise pur tout le brieve d'assise de common de pasture, et assise de mortdancer est prise pur tout le brieve d'assise de mortdancer, et assise de darraigne presentment est prise pur tout le brece d'assise de darraigne presentment. Mes il semble, que le cause pur que tiels briefes al commencement fueront appels assises fuit, pur ceo que per chescun tiel brieve il est commande al viscount, quòd summoneat xii, le quel est a tant a dire, que doit summoner un jurie. Et ascun foits

**A**ND memorandum, that this name assise is nomen equivoecum; for sometimes it is taken for a jury; for the beginning of the record of an assise of novel disseisin beginneth thus: assisa venit recognitura, &c. which is the same as jurata venit recognitura. And the reason is, for that by the writ of assise it is commanded to the sherife, quòd faceret duodecim liberos & legales homines de vicineto, &c. videre tenementum illud, et nomina illorum imbreciare, et quòd summoneat eos per bonos summonitores, quòd sint coram justiciariis, &c. parati inde facere recognitionem, &c. And because that, by such an original, a pannell by force of the same writ ought to be returned, &c. it is said in the beginning of the record in the assize, assisa venit recognitura, &c. Also, in a writ of right it is commonly said that the tenant may put himselfe on God and the great assise. Also there is a writ in the register, which is called a writ de magna assisa eligenda. So as this is well proved, that this name assise sometimes is taken for a jury. And sometimes it is taken for the whole writ of assise; and according to this purpose it is most properly & most commonly taken, as an assise of novel disseisin is taken for the whole writ of assise of novel disseisin. And in the same manner an assise of common of pasture is taken for the whole writ of assise of common of pasture, and assise of mortdauncester is taken for the whole writ of assise of mortdauncester, and assise of darraigne presentment is taken for the whole writ of darraigne presentment. But it seemes, that the reason why such writs at the beginning were called assises was, for that by every such writ it is commanded to the sherife, quòd summoneat 12, which is as much to say, that hee ought to summon a jury

*foits assise est prise par un ordinance, scil. pur mitter certaine choses en certaine rule et disposition, sicome ordinance, que est appel* (1) † *assisa panis et cervisie.*

jury. And sometime assise is taken for an ordinance, to wit, to put certaine things into a certaine rule and disposition, as an ordinance, which is called *assisa panis et cervisie.*

“**ÆQUIVOCUM.**” (7) For the better understanding hereof, of these there bee two kinds, viz. *equivocum equivocans*; and *equivocum equivocatum*.

*Æquivocum equivocans est plurivocum, polysemus*, a word of divers severall significations.

*Æquivocum equivocatum est univocum*, that is to say, reduced to a certaine signification. As here in *Littleton's* example, *assisa est nomen equivocum equivocans*; for sometime it signifieth a jury, sometime the writ of assise, and sometime an ordinance or statute. Now assise, *jurata*, (8) is *equivocum equivocatum*; and so is *breve de assisa nove disseisinæ*, and *assisa panis, &c.* Even as *canis est nomen*

[155. a.] *equivocum; canis latrabilis, canis marinus, canis celestis, sunt equivoca equivocata.*

“*Assise de novel disseisin.*” Note [a], there be foure assises, viz. this writ, an assise of mortdancer, of darreine presentment, and of utrum. (1).

“*Vicount.*” Vide sect. 248. verbo (*Shireve.*)

“*Quod faciat 12 liberos et legales homines de vicineto, &c.*”

[b] Albeit the words of the writ be *duodecim*, yet by ancient course the sherife must return (2) 24: and this is for expedition of justice: for if 12 should onely be returned, no man should have a full jury appear, or be sworn in respect of challenges, without a *tales*, which should be a great delay of tryals. So as in this case usage & ancient course maketh law. And it seemeth to me, that the law in this case delighteth herselfe in the number of 12; for there must not onely be 12 *jurors* (3) for the tryall of matters of fact, [c] but 12 judges of ancient time for tryall of matters of law in the *Exchequer Chamber*. Also for matters of state there were in ancient time twelve *Counsellors of State*. He that wadgeth his law must have eleven others with him, which thinke hee sayes true. And that number of twelve is much respected in holy writ, as 12 *apostles*, 12 *stones*, 12 *tribes*, &c.

[d] He that is of a jury, must be *liber homo*, that is, not only a freeman and not bond, but also one that hath such freedome of mind as he stands indifferent as hee stands unsworne. Secondly, he must bee *legalis*. And by the law every juror, that is returned for the tryall of any issue or cause, ought to have three properties.

First,

(2) Co. 70.

[a] Bracton lib. 4. fo. 100. Britton ca. 42. fo. 105. 134. F. N. B. Fleta lib. 4. ca. 5. &c. Mirr. ca. 2. sect. 13.

(Ant. 109. b. Post. 168. a.) [b] 1 H. 7. 8.

[c] Vid. Pl. Com. in procmo.

Jothan 4. Genes. 49.

[d] 9 E. 4. 16.

--- Job. 303.

Lord Coke means “taken for *jurata*.”

(2) See 3. G. 2. c. 25. s. 8.

(3) [See Note 274.]

(1) † The words *entre les anciens estatutes* are here added in L. & M. Rob. and F.

[ ]  
Juris utrum.

(\*) Arde. super  
Cart. ca. 9.  
Regist. 176.  
§ 2. 3. 36.

(\*) First, hee ought to bee dwelling most neere to the place where the question is moved. (2) [155. b.]

Secondly, he ought to bee most sufficient both for understanding, and competencie of estate. (3)

Vid. Sect. 122. 193.

Thirdly, he ought to bee least suspitious, that is, to be indifferent as he stands unsworne: and then hee is accounted in law *liber et legalis homo*; otherwise he may be challenged, and not suffered to be sworne. (4)

9 H. 6. 37.

The most usual triall of matters of fact is by 12 such men; for *ad questionem facti non respondent iudices*: and matters in law the judges ought to decide and discusse; for *ad questionem juris non respondent juratores*. (5)

(c) Vid. Arde.  
super Cart. ca. 9.  
Fortesc. ca. 26,  
§ 2. 36.

(f) Glanvill. lib.  
2. cap. 14. 16.  
Bracton lib. 3.  
fol. 114. a.

(g) Lamb. verb.  
Centuria.

(A) Lamb. fol.  
91. 3.

[c] For the institution and right use of this triall by 12 men, and wherefore other countries have them not, and how this triall excells others, see *Fortescue* at large, cap. 25, &c. et 29. [f] And in ancient time they were 12 knights. This trial of the fact *per duodecim liberos et legales homines* is very ancient; for heare what the law was before the conquest. [g] *In singulis centuriis comitia sunt, atque libera conditionis viri duodecim etate superiores und cum preposito sacra tenentes jurant, &c.* Nay the triall, in some cases, *per medietatem lingue*, (as we speake) was as ancient. [h] *Viri duodecim jure consulti, Anglie sex, Wallie totidem, Anglie et Wallie jus dicunt*; and of ancient time it was called *duodecim virale judicium*. (6)

Now seeing we are justly occasioned, and the rather for the (*&c.*) herein, to speak of a challenge to jurors, to make the studious reader capable of the understanding of the bookes of law concerning this matter, it shall be necessary to say somewhat of challenges: and, first, what a challenge is.

*Challenge* is a word common as well to the English as to the French, and sometimes signifieth to claime, and the Latine word is *vendicare*; sometime in respect of revenge to challenge into the field, and then it is called in Latine *vindicare* or *provocare*; sometime in respect of partiality or insufficiency, to challenge in court persons returned on a jury. And seeing there is no proper Latin word to signify this particular kind of challenge, they have framed a word anciently written, [a] *calumniare*, and *columpniare*, and *calumpniare*, and now written *calumniare*; and hath no affinity with the verbe *calumnior*, or *calumnia*, which is derived of that, for that is of a quite other sense, signifying a false accuser, and in that sense [b] *Bracton* useth *calumniator* to be a false accuser: but it is derived of the old word *caloir* or *chaloir*, which in one signification is to care for or foresee. And for that to challenge jurors is the meane to care for or foresee, that an indifferent triall be had, it is called *calumniare*, to challenge, that is, to except against them that are returned to be jurors; and this is his proper signification. [c] But sometimes a summons, *sommonitio*, is said to be *calumniata*, and a count to be challenged, but this is improperly. And foras-

much as mens lives, fames, lands and goods, are to be [156. a.] tried by jurors, it is most necessary, that they be *omni excepti majores*; and therefore I will handle this matter the more larg

A ch

(2) [See Note 275.]

(3) See post. 156. a.

(4) Of other modes of trying facts besides that by jury, see ant. 74. a.

(5) [See Note 276.]

(6) See further on the origin of English

juries, Spelm. Gloss. voc. *jurata*, &c. et Epistolar. in Ling. Septentrion. The sur. Hickee. Stiernh. de jure Sueon. et Goth. vetust. lib. 1. c. 3. and Dr. Pettingal's Enquiry into the Use and Practicē of Juries amongst the Greeks and Romans.





yet the jurie may be taken of the residue. And if others be joynd with the lord of parliament, yet if there be no knight returned, the array shall be quashed against all. [h] So in an attaint there ought to be a knight returned of the jurie (3).

[i] And when the king is partie, as in travers of an office, he that traverseth may challenge the array, as hereafter in this Section shall appeare; and so it is in case of life; and likewise the king may challenge the array: and this shall be tried by triors according to the usual course. [k] The array challenged on both sides shall be quashed.

[l] And if two strangers make a pannel, and not in favourable manner for the one partie or the other, and the sherife returns the same, the array was challenged for this cause, and adjudged good.

[m] If the bailife of a libertie returne any out of his franchise, the array shall be quashed, as an array returned by one that hath no franchise, shall be quashed.

Challenge to the array for favour. [n] He, that taketh this, must shew in certaine the name of him that made it, and in whose time, and all in certaintie. This kinde of challenge, being no principall challenge, must be left to the discretion and conscience of the triors. As if the plaintife or defendant be tenant to the sherife, this is no principall challenge; for the lord is in no danger of his tenant; but *à converso* it is a principall challenge; but in the other hee may challenge for favour, and leave it to triall. So affinitie betweene the sonne of the sherife and the daughter of the partie, or *à converso*, or the like, is no principall challenge, but to the favour: but if the sherife marrie the daughter of either partie, or *à converso*, this, (as hath beene said) is a principall challenge, or the like. [o] But where the king is partie, one shall not challenge the array for favour, &c. because in respect of his allegiance he ought to favour the king more (4). But if the sherife be a vadelect of the crowne, or other meniall servant of the king, there the challenge is good (5). And likewise the king may challenge the array for favour.

Note, upon that which hath been said it appeareth, that the challenge to the array is in respect of the cause of unindifferencie or default in the sherife or other officer that made the returne, and not in respect of the persons returned where there is no [156.b.] unindifferencie or default in the sherife, &c. for if the challenge to the array be found against the partie that takes it, yet he shall have his particular challenge to the polls (1).

In some cases a challenge may be had to the polls, and in some cases not at all. Challenge to the polls is a challenge to the particular persons; and these be of foure kinds, that is to say, peremptorie, principall, which induce favour, and for default of hundredors.

[h] Peremptorie. This is so called, because he may challenge peremptorily upon his owne dislike, without shewing of any cause; and this onely is in case of treason or felonie, *in favorem vite*. And by the common law the prisoner, upon an endictment or appeale, might challenge thirtie five, which was under the number of three juries. But now by the statute of 22 H. 8. the number is reduced to twentie in petite treason, murder and felonie; and in case of high treason, and misprision of high treason, it was taken

away

[h] 17 E. 2.  
Attaint 60.

[i] 32 E. 4.  
tit. Chall. 63.  
Stanf. Pl. Cor.  
19 Am. 6. b.  
4 H. 7. 2.  
44 E. 3. 38.  
(3 Ro. Abr. 646.)  
[j] 8 H. 4. 22.  
(Mo. 895.)  
[k] 6 R. 2.  
Chall. 102.  
13 E. 3.  
ibid. 106.

[m] 32 E. 3.  
Chall. 110, 111.  
32 Am. 6.  
38 Am. 13.

[n] 34 H. 6.  
Chall. 69.  
8 H. 4. 22.  
27 Am. 30.  
23 E. 3. 12.  
Vid. 36. Am. 31.  
38 M. 6. 9.  
7 H. 6. 28.  
19 H. 6. 48.  
20 H. 6. 38.  
20 E. 4. 2.  
23 E. 4.  
Chall. 62.

[o] 22 E. 4.  
Chall. 63.  
4 H. 7. 9.

[p] 1 H. 8.  
Chall. 102.  
9 H. 5. 7.  
16 E. 4. 32.  
14 H. 7. 7. 19.  
Doct. & Stud.  
lib. 2.  
Fortescue cap.  
27. 3 H. 7. 2.  
2 R. 3. 13.  
32 H. 6. 20.

(3) [See Note 279.]  
(4) [See Note 280.]  
(5) [See Note 281.]

[156. b.]  
(1) [See Note 281\*.]

away by the statute of 33 H. 8. but now by the statute of 1 & 2 Phil. & Marie, the common law is revived. For any treason, the prisoner shall have his challenge to the number of thirtie (2) five; and so it hath been resolved \* by the justices upon conference betweene them in the case of sir Walter Raleigh and George Brookes, But all this is to be understood when any subject that is not a peere of the realme, is arraigned for treason or felonie. But if hee be a lord of parliament and a peere of the realme, and is to be tryed by his peeres, he shall not challenge any of his peers at all; for they are not sworne as other jurors be, but finde the partie guiltie or not guiltie upon their faith or allegiance to the king, and they are judges of the fact, and every of them doth separately give his judgement, beginning at the lowest. But a subject under the degree of nobilitie may in case of treason or felonie challenge for just cause as many as he can, as shall be said hereafter. In an appeale of death against divers, they pleade not guiltie, and one joint *venire facias* is awarded; if one challenge peremptorily, he shall be drawne against all. (3) Otherwise it is of severall *venire fac.*

Note, that at the common law before the statute of 33 E. 1. the king might have challenged peremptorily without shewing cause, but only that they were not good for the king, and without being limited to any number. But this was mischievous to the subject tending to infinite delays and danger. And therefore it is enacted, [*q*] *quoddam de catero licet pro domino rege dicatur, quod juratores, &c. non sunt boni pro rege; non propter hoc remaneant inquisitiones, &c. sed assignent certam causam calumnie sue, &c.* whereby the king is now restrained. (4)

Principall; so called, because if it be found true, it standeth sufficient of itselfe without leaving any thing to the conscience or discretion of the triors. Of a principall cause of challenge to the array we have said somewhat already. Now it followeth with like brevity to speake of principall challenges to the polles, (that is) severally to the persons returned.

Principall challenges to the poll may be reduced to foure heads: first, *propter honoris respectum*, for respect of honour: secondly, *propter defectum*, for want or default: thirdly, *propter affectum*, for affection or partialitie: fourthly, *propter delictum*, for crime or delict.

I. *Propter honoris respectum*, as any peere of the realme, or lord of parliament, as a baron, viscount, earle, marquesse, and duke: for these in respect of honour and nobilitie, are not to be sworne on juries; and if neither partie will challenge him, he may challenge himselfe; for by *Magna Charta* it is provided, *quoddam nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, aut per legem terra.* Now the common law hath divided all the subjects into lords of parliament, and into the commons of the realme. The peers of the realme are divided into barons, viscounts, earles, marquesses, and dukes. The commons are divided into knights, esquires, gentlemen, citizens, yeomen, and burgesses. And in judgement of law any of the said degrees of nobilitie are peers to another. As if an earle, marquesse, or duke, be to be tried for treason or felonie, a baron or any other degree of nobilitie is his peere. In like manner, a knight, esquire, &c. shall be tried

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17 Ass. 6.  
37 H. 6. 8.  
22 H. 8. ca. 14.  
33 H. 8. tit  
Chal. Br. 217.  
33 H. 8. ca. 23.  
1 & 2 P. & M.  
ca. 10.  
23 H. 6. 26.  
14 H. 7. 14.  
Stanf. Pl. Cor.  
137, 138.  
(3. Inst. 227.)  
\* Hill. 1 Ja. R.

9 E. 4. 27.

(1. Vent. 309.)

[9] 33 E. 1.  
ordinatio de in-  
quisitionibus.  
Stanf. Pl. Cor. 162.

6 Co. 52. 53.  
Countesse de  
Rutland's case.  
48 E. 3. 30.  
48 Ass. 6.  
35 H. 6. 46.  
22. Ass. 24.  
F. N. B. 165.  
D. E. & 166.  
Regist. 179.  
(1. Sid. 277.)

(2) Agreed acc. in petty treason in Swan's case, Fost. 107.

(3) Adj. acc. Plowd. 100.  
(4) [See Note 282.]

*per pares*; and that is by any of the commons, as gentlemen, citizens, yeomen, or burgesses; so as when any of the commons is to have a tryall either at the king's suit, or betwene partie and partie, a peere of the realme shall not be impannelled in any case.

## II. *Propter defectum.*

1. *Patria*, [*a*] as aliens borne.

2. *Libertati*, [*b*] as villeins or bondmen, and so a champion must be a freeman.

3. *Annui census, i. e. liberi tenementi*. [*c*] First, what yearely freehold a juror ought to have that passeth upon triall of the life of a man, or in a plea reall, or in a plea personall, where the debt or dammage in the declaration amounteth to fortie markes, *Vide* Sect. 464. (5) \* Secondly, this freehold must be in his owne right, in fee simple, fee taile, for terme of his owne life, or for another man's life, although it be upon condition, or in the right of his wife, out of ancient demesne, for freehold within ancient demesne will not serve. But if the debt or dammage amounteth not to fortie marks, any freehold sufficeth. [*d*] Thirdly, he must [157. a.] have freehold in that countie where the cause of the action ariseth; and though he hath in another, it sufficeth not (1). [*e*] Fourthly, if after his returne he selleth away his land, or if *cestuy que vie* or his wife dieth, or an entry be made for the condition broken, so as his freehold be determined, he may be challenged for insufficiencie of freehold (2).

4. *Hundredorum*. First, by the common law, in a plea reall mixt and personal, there ought to be foure of the hundred (where the cause of action ariseth) returned for their better notice of the cause; for *vicini vicinorum facta presumuntur scire* (3). And now since *Littleton* wrote [*f*] in a plea personall, if two hundredors appeare, it sufficeth (4); and in an attaint, [*g*] although the jury is double, yet the hundredors are not double. Secondly, [*h*] if he hath either freehold in the hundred, though it be to the value but of half an acre, or if he dwell there, though he hath no freehold in it, it sufficeth. [*i*] Thirdly, if the cause of the action riseth in divers hundreds, yet the number shal suffice, as if it had come out of one, and not severall hundredors out of each hundred. [*k*] Fourthly, if there be divers hundreds within one leet or rape, if he hath any freehold, or dwell in any of those hundreds though not in the proper hundred, it sufficeth. [*l*] Fifthly, if the jury come *de corpore comitatus*, or *de proximo hundredo*, where the one partie is lord of the hundred, or the like, there need no hundredors be returned at all. [*m*] Sixtly, if a hundredor after he be returned sell away his land within that hundred, yet shall he not be challenged for the hundred, for that this notice remains. Other-  
wist

[a] 7. Co. 18.  
Calvin's case.  
10. Co. 104.  
14 H. 4. 19. b.  
[b] Bract. fo. 188.  
Brit. fo. 135. Flet.  
H. 4. ca. 2. 20.  
Ass. 29. 3 H. 6. 39.  
9 E. 4. 16. b.  
21 H. 6. 30.  
10 H. 7. 30.  
[c] Vid. Sect. 464.  
32. Ass. 19.  
17. Ass. 18.  
9 H. 6. 28.  
9 H. 6. 25.  
10 H. 6. 7, 8. 18.  
2 H. 7. 1.  
10 H. 7. 14.  
19 H. 6. 9.  
7 H. 6. 25. 40. 44.  
12 E. 4. 13.  
9 H. 4. 4.  
(See the statutes of  
23 H. 8. 13. and  
4 & 5 W. &  
M. 34.)  
9 H. 6. Chal. 27.  
9 H. 7. 1.  
(2. Ro. Abr. 647.  
Post. 372. Fortesc.  
50. 62. a.) [d] 10 H. 6. 9. 17 Ass. 18. [e] 12. H. 7. 4. 21 H. 6. 36. 7 H. 4. 1. (Post. 372. b.) (2. Ro. Abr. 636.  
Fortesc. 50. b. Post. 188. a.)

[f] 27 Eliz. ca. 6.

[g] 7 H. 4. 47.  
[A] 16 E. 4. 7.  
4. Mar. Br.  
Chal. 216.  
21 E. 4. 74. 75.  
9 H. 6. 66.  
[i] 30 H. 6. 23.  
4. Mar. Br.  
Chal. 216.  
[k] 10 H. 6. 4.  
12 H. 4. 14.  
19 E. 4. 5.  
[l] 37 H. 6. 11.  
25 E. 3. 43.  
(Cro. Jam. 680.)

[m] 21 H. 6. 38.  
12 H. 7. 4.

(5) See also a learned dissertation on the writ *de non ponendis in assisis et juratis* in the Miscellany of Law-Tracts by the late Mr. Serjeant Wynne, p. 62. to 74. See too 1. Ventr. 366. and Sir John Hawles's Remarks on Trials, in State Trials, 4th ed. v. 3. p. 169. 187.

[157. a.]

(1) *Vid. acc. per omnes justiciarios M. 29.*  
30. Eliz. Clench. 139.—Hal. MSS.

(2) See ant. 102. b.

(3) See Brownl. Rep. b. 194.

(4) [See Note 283.]

wise as hath bin said for his insufficiencie of freehold; for his feare to offend, and to have lands wasted, &c. which is one of the reasons of law, is taken away. [n] Seventhly, he that challengeth for the hundred must shew in what hundred it is, and not drive the other partie to shew it. Eightly, his challenge for the hundred is not *simpliciter* but *secundum quid*; for, though it bee found, that he hath nothing in the hundred yet shall he not be drawne, but remaine *preter H.* that is, besides, for the hundred; and albeit he dwelleth or have land in the hundred, yet must he have sufficient freehold.

III. *Propter affectum*: And this is of two sorts, either working a principall challenge, or to the favour. And againe a principall challenge is of two sorts, either by judgement of law without any act of his, or by judgement of law upon his owne act.

And it is said that a principall challenge is, when there is expresse favor or expresse malice.

1. Without any act of his, as if the juror bee [a] of blood or kindred to either partie, *consanguineus*, which is compounded *ex con & sanguine, quasi eodem sanguine natus*, as it were issued from the same blood; and this is a principall challenge, for that the law presumeth that one kinsman doth favour another before a stranger; [b] and how farre remote so ever he is of kindred, yet the challenge is good. And if the plaintife challenge a juror for kindred to the defendant, it is no counter plea to say that he is of kindred also to the plaintife, though hee bee in a neerer degree; for the words of the *venire facias* forbiddeth the juror to be of kindred to either partie.

[c] If a body politick or incorporate, sole or aggregate of many, bring any action that concernes their body politick or incorporate, if the juror be of kindred to any that is of that body (although the body politick or incorporate can have no kindred) yet for that those bodies consist of naturall persons, it is a principall challenge. [d] A bastard cannot be of kindred to any, (5) and therefore it can be no principall challenge. And here it is to be knowne, that *affinitas*, affinity, hath in law two senses. In his proper sense it is taken for that nearnesse that is gotten by marriage. *Cum due cognationes inter se devisee per nuptias copulantur, & altera ad alterius fines accedit, & inde dicitur affinis.* In a larger sense *affinitas* is taken also for consanguinitie and kindred, as in the writ of *venire facias*, and elsewhere. [e] Affinity or alliance by marriage is a principall challenge, and equivalent to consanguinity when it is betweene either of the parties, as if the plaintife or defendant marry the daughter or cousin of the juror, or the juror marry the daughter or cousin of the plaintife or defendant, and the same continues, or issue be (6) had. But if the son of the juror hath married the daughter of the plaintife, this is no principall challenge, but to the favour; because it is not betweene the parties. Much more may be said hereof; *sed summa sequor fastidia rerum.*

[f] If there be a challenge for cosinage, he that taketh the challenge must shew how the juror is cousin. But yet if the cosinage, that is the effect and substance, be found, it sufficeth; for the

[n] 7 Eliz.  
Dyer 231.

Bract. fo. 185.  
Brit. fo. 134, 135.  
Fleta lib. 4. c. 8.  
21 E. 4. 11, 12.

[a] Britton fol. 135.

[b] Mirror. ca. 3.  
de ordinance  
d'attaint  
Bracton } ubi  
Britton } supra.  
Fleta }  
14 Ed. Dier 319.  
21 E. 4. 75.  
40 Ass. 30. Pl.  
Com. fo. 41 E. 3.  
Chal. 99.  
21 E. 4. 75.  
[c] 7 E. 4. 4.  
17 E. 4. 7.  
21 E. 4. 30.  
28 H. 6. 10.  
28 Ass. 18.  
34 Ass. 6.  
Hob. 87.  
1 Saund. 344.  
[d] 41 E. 3.  
Chal. 99. 41 E. 3.  
9. 28 H. 6.  
Chal. 103.

[e] Mirror  
Bracton } ubi  
Britton } supra.  
Fleta }  
3 E. 4. 14.  
21 E. 3. 5. 41.  
43 E. 3.  
Chal. 93.  
43 Ass. 25, 26.  
28 E. 4. 2.  
14 H. 7. 8.  
16 H. 7. 9.

[f] 19 H. 8. 7.  
28 H. 6. Dier  
27. 1 Marine  
Dier 91. 2 Eliz.  
ibid. 177.

(5) See ant. 123. a.

(6) But the issue must be living. Sec ant. 156. a. n.

the law preferreth that which is materiall before that which is formall.

[g] If the juror have part of the land that dependeth upon the same title. (7)

[h] If a juror be within the hundred, (8) leet, or any way within the seigniori immediately or mediately, or any other distresse of either party, this is a principall challenge. But if either party be within the distresse of the juror, this is no principall challenge, but to the favour.

[i] If a witness named in the deed (9) be returned of the jury, it is a good cause of challenge of him. [k] So it is if one within age of one and twenty bee returned, it is a good cause of challenge.

2. [l] Upon his own act, as if the juror hath given a verdict before for the same cause, albeit it be reversed by [157. b.] writ of error, or if after verdict, judgement were arrested. So if hee hath given a former verdict upon the same title or matter though betweene other persons. [m] But it is to be observed, that I may speake once for all, that in this or other like cases, hee that taketh the challenge must shew the record if he will have it take place as a principal challenge: otherwise he must conclude to the favour (1), unlesse it be a record of the same court, and then he must shew the day and terme.

[n] So likewise one may be challenged, that he was inditor of the plaintife or defendant, either of treason, felony, misprision, trespassse, or the like in the same cause.

[o] If the juror be godfather to the child of the plaintife or defendant, or *converso*, this is allowed to be a good challenge in our bookes (2).

[p] If a juror hath beene an arbitrator chosen by the plaintife or defendant in the same cause, and have beene informed of, or treated of the matter, this is a principall challenge. Otherwise if he were never informed, nor treated thereof; and otherwise if hee were indifferently chosen by either of the parties, though he treated thereof. But a [q] commissioner chosen by one of the parties for examination of witnesses in the same cause, is no principall cause of challenge; for he is made by the king under the great seale, (3) and not by the partie, as the arbitrator is; but he may upon cause be challenged for favour.

[r] If hee be of counsell, servant, or of robes, or fee of either partie, it is a principall challenge. (4)

[s] If any after he be returned do eate and drink at the charge of either partie, it is a principall cause of challenge (5). Otherwise it is of a trior after he be sworne.

Actions

(7) Here the sense is incompleat; but I apprehend, that lord Coke means to give the exception as a principal challenge.

(8) Acc. Dy. 176. a.

(9) See ant. 6. a.

(2) See Mo. 3.

(3) See an instance of such a commission in Cro. Jam. 65.

(4) See ant. 156. a. n. 4.

(5) The same thing avoids a verdict. Post. 227. b.

[157. b.]

(1) Acc. 2. Brownl. 268.

[g] Bract } ubi  
Britton } supra.  
Fleta }  
Mirr. ubi supra.  
[h] 9 H. 6.  
24. Chal. 57.  
38 E. 3. 28.  
23 E. 4. Chal. 61.  
4 H. 6. 15.  
3 H. 6. 30.  
36 H. 6. Chal.  
46. 22 E. 4. 1.  
27 Am. 28.  
28 E. 3. 12.  
[i] 22. Am. 11.  
[k] Mirr. ubi  
supra.  
[l] 8 H. 5. 10.  
33 H. 6. 1.  
10 H. 6. 24.  
7 H. 4. 11.  
18 E. 4. 12.  
31 E. 4. 74.  
11 E. 2. 21.  
Challenge 106.  
27 Am. 13.  
[m] 43 E. 3.  
Chal. 93.  
8 H. 3. 10.

[n] Mirr. ubi  
supra. Brit. fo.  
12. 11 Am. 36.  
8 H. 4. 2.  
7 E. 4. 4.  
28 Am. 26.  
10 Am. 6.  
40 Am. 10.  
24 E. 3. c. 3.  
[o] 40 Am. 20.  
2 H. 4. 14.  
10 H. 6.  
Chal. 40.  
7 H. 6. 40.  
10 H. 6. 64.  
4 E. 4. 11.  
7 E. 4. 4.  
[p] 30 H. 6. 39.  
9 E. 4. 46.  
36 H. 6.  
10 H. 6.  
3 H. 6. 24.  
7 H. 7. 12.  
[q] 30 Abr. 666.  
[r] 9 Co. 71. For  
cock's case.  
[s] Mirr. } ubi  
Britton } supra.  
28 Am. 36.  
26 Am. 20.  
28 Am. 19.  
31 Am. 7.  
44 Am. 18.  
[t] 13 H. 4. 13.  
11 E. 2. Chal. 104.

[z] Actions brought, either by the juror against either of the parties, or by either of the parties against him, which imply malice or displeasure, are causes of principall challenge; unlesse they be brought by covyn either before or after the returne; for if covyn be found, then it is no cause of challenge. Other actions, which doe not imply malice or displeasure, are but to the favour.

[u] In a cause, where the parson of a parish is partie, and the right of the church commeth in debate, a parishioner is a principall challenge. Otherwise it is in debt, or any other action where the right of the church commeth not in question.

[w] If either party labour the juror, and give him any thing to give his verdict, this is a principall challenge. But if either partie labour the juror to appeare and to doe his conscience, this is no challenge at all, but lawfull for him to do it. (6)

[x] That the juror is a fellow servant with either partie is no principall challenge, but to the favour.

[y] Neither of the parties can take that challenge to the polls, which he might have had to the array.

[a] Note, if the defendant may have a principall cause of challenge to the array, if the sherife returne the jury, the plaintife in that case may for his owne expedition alledge the same, and pray processe to the coroners; which he cannot have, unlesse the defendant will confesse it; but if the defendant will not confesse it, then the plaintife shall have a *venire facias* to the sherife, and the defendant shall never take any challenge for that cause (7), and so in like cases. But on the part of the defendant any such matter shall not bee alledged, and processe prayed to the coroners; because he may challenge the jury for that cause, and can be at no prejudice.

[b] Challenge concluding to the favour, when either partie cannot take any principall challenge, but sheweth causes of favour, which must be left to the conscience and discretion of the triors upon hearing their evidence to find him favourable or not favourable. But yet some of them come neerer to a principall challenge then other. [c] As if the juror be of kindred, or under the distresse of him in the reversion or remainder, or in whose right the avowrie or justification is made, or the like, these be no principall challenges; because he in reversion, remainder, or in whose right the avowrie or justification is, is not partie to the recorde; otherwise it is if they were made parties by aide, resceipt, or voucher: and yet the cause of favour is apparent; so it is of all principall causes, if they were partie to the record. Now the causes of favour are infinite; and thereof somewhat may be gathered of that which hath been said, and the rest I purposely leave the reader to the reading of our bookes concerning that matter. For all which the rule of law is, that he must stand indifferent as hee stands unsworne.

[d] The subject may challenge the polles, where the king is partie. And if a man bee outlawed of treason or felony, at the suit of the king, and the party for avoyding thereof alledgeth imprisonment, or the like, at the time of the outlawry; though the issue bee joyned upon a collaterall point, yet shall the partie have such challenges

[f] Brac. } ubi  
Fleta } supra  
44 E. 3. 5. 38.  
44 Ass. 23.  
8 E. 3. 25.  
43 B. 3. 31.  
22 E. 4. 1.  
38 H. 6. 6.  
43 E. 3.  
Chal. 93.  
11 H. 4. 26.  
11 H. 6. 15.  
32 E. 3. Chal.  
189. 24 E. 3. 37.  
39 Ass. 2.  
20 Ass. 11.  
43 Ass. 46.  
[u] 17 Ass. 15.  
[w] 8 E. 3. 39.  
20 H. 6. 30.  
33 H. 8. Dyer 48.  
(Post. 379. a.  
Hob. 204.)

[x] 22 Eliz.  
Dyer 367.  
Bracton } ubi  
Britton } supra  
Fleta }  
[y] 20 E. 3. 1.  
[a] 9 E. 4. 6.  
21 E. 4. 31.  
22 E. 4. 3.  
14 H. 6. 2.  
20 E. 4. 2.  
3 H. 7. 5.  
23 Eliz. Dyer  
367.  
[b] Ho. Abr.  
644. 658. 669.  
Cro. Jam. 547.  
Post. 320. b.  
Plowd. 74. a.  
Hob. 64.)

[c] Mirror ca. 3.  
d'Ordinance  
d'attaint. Bract.  
lib. 4. fol. 185.  
Britt. fol. 134.  
135. Fleta lib. 4.  
c. 8.  
7 H. 6. 25.  
[d] 9 H. 7. 3.  
10 M. 7. 20.  
3 H. 7. 2.  
10 E. 4. 12.  
15 E. 4. 19.  
12 Ass. 33.  
(1 Ro. Rep. 328.  
Cro. Jam. 547.)

[e] 6 R. 2.  
Chal. 141.  
19 Ass. 6.  
38 Ass. 22.  
11 R. 2.  
Chal. 165.  
4 H. 5. ibid. 153.  
(Ibid. 244.)

(6) [See Note 284.]

(7) Held accordingly Hutt. 22.

challenges as if he had been arraigned upon the crime it self, for this by a meane concerneth his life also (8).

[c] Mirror  
Briarton } ubi  
Britton } supra  
Fleta }  
11 H. 4. 41.  
12 H. 4. 10.  
23 H. 6. 21.  
(2 Ro. Abr. 680.)

IV. *Propter delictum*. [c] As if the juror be attainted or convicted of treason, or felony, or for any offence to [158. a.] life or member, or in attain for a false verdict, or for perjury as a witnesse, or in a conspiracie at the suit of the king, or in any suite (either for the king, or for any subject) be adjudged to the pillory, tumbrell, or the like, or to be branded, or to be stigmatique, or to have any other corporall punishment whereby he becommeth infamous, (for it is a maxime in law, *repellitur à sacramento infamis*) these and the like are principall causes of challenge. So it is if a man be outlawed in trespasse, debt, or any other action, (1) for he is *exlex*, and therefore is not *legalis homo*. And old bookes have said, that, if he be excommunicated, he could not be of a jury.

[f] W. 2. ca. 38.  
Artic. super  
cart. ca. 9.  
F. N. B. 168,  
& 166. Registr.

[f] See the statutes of W. 2. and *Artic. supra Cartas*, what persons the sherife ought to returne on juryes. And see *F. N. B. breve de non ponendis in assisis et juratis*, (2) and the register in the same writ. And see there what remedy the party hath that is returned against law.

[g] 9 E. 4. 16.  
10 H. 4. 9.  
37 H. 6. 2.  
3 H. 6. 38.  
Brooke tit.  
Chal. 9.  
7 H. 6. 40.  
14 H. 7. 5. 6.  
[A] 9 E. 4. 16.  
27 H. 6. 2.  
[J] 43 E. 3.  
Chal. 93.  
20 E. 3. ibid.  
116. 23 E. 4.  
ibid. 61.  
7 H. 4. 41.  
3 El. Dow. 201.  
[k] 22 E. 4. 1.  
9 H. 5. 6.  
[J] 1 H. 5. 10.  
36 Ass. 23.  
(Ant. 157. a.)

It is necessarie to be knowne the time when the challenge is to be taken. [g] First, he that hath divers challenges must take them all at once, and the law so requireth indifferent trialls, as divers challenges are not accounted double. [h] Secondly, if one be challenged by one party, if after he be tried indifferent, it is time enough for the other party to challenge him. [i] Thirdly, after challenge to the array, and triall duely returned, if the same party take a challenge to the polls, hee must shew cause presently. [k] Fourthly, so if a juror be formerly sworn, if he be challenged, he must shew cause presently, and that cause must rise since he was sworne. [l] Fifthly, when the king is party or in an appeale of felony, the defendant, that challengeth for cause, must shew his cause presently. Sixtly, if a man in case of treason or felony challenge for cause, and he be tried indifferent, yet he may challenge him peremptorily. Seventhly, a challenge for the hundred must bee taken before so many bee sworne as will serve for hundredors, or else hee loseth the advantage thereof. Eighthly, [m] in a writ of right, the ground jury must bee challenged before the foure knights before they be returned in court; (3) for after they be returned in court, there cannot any challenge be taken unto them. Ninthly, *nota*, [n] The array of the *tales* shall not bee challenged by any one party, untill the array of the principall be tried; but if the plaintiffe challenge the array of the principall, the defendant may challenge the array of the *tales*. After one hath taken a challenge to the polle, he cannot challenge the array.

[m] 7 H. 4. 20.  
18 E. 4. 1.

[n] 9 E. 4. 27.  
9 H. 5. 11.  
34 Ass. 6.  
13 E. 3.  
Chal. 168.

Now it is to be seene, how challenges to the array of the principall pannell, or of the *tales*, or of the polles shall be tried, and who shall bee triors of the same, and to whom processe shall be awarded.

[o] 18 E. 4. 2.  
(Fortesc. 55.)

1. [o] If the plaintife alledge a cause of challenge against the sherife, the processe shall be directed to the coroners; if any cause against

(8) [See Note 285.]

[158. a.]

(1) [See Note 286.]

(2) See the late Mr. Serj. Wynn's Dissertation upon this writ in his Miscellany of Law Tracts, p. 56.

(3) Acc. ant. 156. b. & post. 294. a.



against any of the coroners, processe shall be awarded to the rest ; if against all of them, then the court shall appoint certaine elisors or eslors (so named *ab eligendo*) because they are named by the court, against whose returne no challenge shall be taken to the array, because they were appointed by the court ; but hee may have his challenge to the (4) polles. [h] Note, if processe be once awarded for the partiality of the sherife, though there be a new sherife, yet processe shall never bee awarded to him ; for the entrie is, *Ita quodd vicecomes se non intromittat*. But otherwise it is, for that he was tenant to either partie, or the like.

2. [g] If the array be challenged in court, it shall be tryed by two of them that be impannelled, to be appointed by the court ; for the triors in that case shall not exceed the number of two, unlesse it be by consent. But when the court names two for some speciall cause alledged by either partie, the court may name others. If the array be quashed, then processe shall be awarded, *ut supra*.

[r] If a pannell upon a *venire facias* be returned, and a *tales*, and the array of the principall is challenged, the triors, which try and quash the array, shall not try the array of the *tales* ; for now it is as if there had beene no appearance of the principall pannell : but if the triors affirme the array of the principall, then they shall try the array of the *tales*. If the plaintife challenge the array of the principall, and the defendant the array of the *tales*, there the one of the principall, and the other of the *tales*, shall try both arrayes. For other matter concerning the *tales*, see [s] in my Reports matters worthy of observation (5). [t] When any challenge is made to the polles, two triors shall bee appointed by the court ; and if they trie one indifferent, and he be sworne, then he and the two triors shall try another ; and if another be tried indifferent, and he be sworne, then the two triors cease, and the two that be sworne on the jury shall try the rest. [u] If the plaintife challenge ten, and the defendant one, and the twelfth is sworne, because one cannot try alone, there shall be added to him one challenged by the plaintife, and the other by the defendant. When the triall is to be had by two counties, the manner of the triall is worthy of observation, and apparent in our [w] books. [x] If the foure knights in the writ of right be challenged they shall try themselves (6), and

[158. b.] they shall choose the ground assise, and try the challenges of the parties. [y] If the cause of challenge touch the dishonor or discredit of the juror, he shall not be examined upon his oath, (1) but in other cases he shall be examined upon his oath, to informe the triors. (2) [z] If an inquest bee awarded by default, the defendant hath lost his challenge ; but the plaintife may challenge for just cause, and that shall be examined and tried.

Wheresoever the plaintife is to recover *per visum juratorum*, there ought to be sixe of the jury that have had the view or knowne the land in question, so as he be able to put the plaintife in possession if he recover.

In a *proprietary probandā*, and a writ to inquire for waste, the parties have beene received to take their challenges. (3) [a] But passing

[p] 15 H. 7. 9.  
14 H. 7. 31.  
18 E. 4. 3.

[q] 39 Ass. 3.  
19 H. 6. 48.  
21 H. 6.  
Chal. 32.  
33 H. 6. 21.  
4 E. 4. 17.  
43 E. 3.  
Chal. 95.  
2 R. 2. 114.  
101. 34. Ass. 6.  
27 Ass. 28.  
43 Ass. 30.  
[r] 9 E. 4. 46.  
19 H. 6. 46.  
34 Ass. 6.  
7 E. 6. Dier 78.  
9 H. 5. 11.

[s] 10 Co. 104.  
105. Denbawd's  
case.  
[t] 19 H. 6. 9.  
23 E. 4.  
Chal. 61, 62.

[u] 7 H. 4. 41.

[w] 11 H. 4. 61.  
48 E. 3. 30.  
11 H. 4. 63.  
[x] 23 E. 3. 18.  
39 E. 3. 2.  
[y] 49 E. 3. 1, 2.  
(Hob. 84. 1. 36d.  
374. 232. Cro.  
Jam. 388.  
1 Ro. Rep. 110.)  
[z] 2 H. 4. 14.  
4 E. 4. 3.  
10 E. 3. 32.  
23 Ass. 28. 31.  
21 H. 6. 60.  
16 Ass. 1.  
5 E. 6. 35, 36.

[a] 2 H. 5. tit.  
Chal. 167.  
2 H. 4. 3.

(4) See further on awarding *venires* to coroners and on appointing *elisors*, Umfrev. Lex Coronator. 235. to 242.

(5) See also Trials per Pais, chap. 5.

(6) Acc. post. 294. a.

[158. b.]

(1) Held accordingly by the Court in Cook's case, Salk. 153.

(2) [See Note 287.]

(3) [See Note 288.]

34 E. 3. Chal. 173.  
21 H. 6. 56.  
8 E. 4. 3.  
16 E. 4. 1.  
\* Bracton lib. 4.  
fo. 155.  
(7. Co. 1.  
Muir's case.)

passing over many things touching this matter, I will conclude with the saying of \* *Bracton*. *Plures autem alie sunt cause recusandi juratores, de quibus ad presens non recolo, sed que jam enumeratæ sunt sufficiant exempli causæ.* (4). And so let us return to *Littleton*.

"*De vicineto, &c.*" It should be *vicineto*. *Vicinetum* is derived of this word *vicinus*, and signifieth neighbourhood, or a place neere at hand, or a neighbour place. And the reason wherefore the jury must be of the neighbourhood, is, for that *vicinus facta vicini præsumitur scire*; all which is implied in this word (*&c.*)

"*Quod summoneat eos, &c.*" *Summoneo* is compounded of *sub* & *monco*, & *euphoniae gratiæ* it is said *summonco*, to warne or summon, as in this case the sherife must warne or summon the recognitors of the assise to appeare before the justices of assise, &c. And it is truly said [b] that in this case *legitimam summonitionem recipere in propria personâ ubicunque inventus fuerit in comitatu in quo fuerit res petita; qui quidem si non inveniatur, sufficit si ad domicilium fiat, dum tamen alicui de familiâ suâ manifeste fuerit relata, &c.*

"*Per bonos summonitores.*" Here two things are to bee observed. 1. That the summoners must be *boni* (*id est*) *fide digni, ut valeant legitimum testimonium perhibere, cum inde per justiciarios fuerint requisiti.* [c] And another saith, *sermo, ne serps, ne enfans, ne nul enfans, ne nul que nest fide tenant, ne poest est bone summoner.* 2. It is spoken in the plurall number, *per bonos summonitores*, and therefore there must be two at the least. *Nec sufficit quod summonitio fiat per unum tantum, &c. necesse est igitur quod per duos ad minus fiat, &c.* There is also a summons of a tenant in a real action; whereof, and of perrors and veiors you shall reade [d] plentifully and plainly in our bookes, whereunto being matter of course I referre you.

*Item summonitionum alia est generalis, alia specialis.* Whereof you shall finde excellent matter in our [e] old bookes, where you shall also reade at large *de summonitione, præsummonitione, & resummonitione.*

"*Facere recognitionem.*" *Cognitio* is knowledge, or knowledge-ment, or opinion, and recognition is a serious acknowledgement or opinion upon such matters of fact as they shall have in charge, and thereupon the jurors are called *recognitores assise*. *Vide* Sect. 233. *recognition* taken for the confession of the tenant.

"*Pannell*" is an English word, and signifieth a little part; for a pane is a part, and a pannell is a little part; as a pannell of wainscot, a pannell of a saddle, and a pannell of parchment wherein the jurors names be written and annexed to the writ. And a jury is said to be impannelled, when the sherife hath entered their names into the pannell, or little peece of parchment, in *pannello assise*.

"*Briefe de droit,*" *Breve de Recto*. Writs of right be of two natures: 1. A writ of right, whereof *Littleton* here speaketh, which is the highest writ of all other reall writs whatsoever, and hath the greatest respect, &c. and the most assured and finall judgement; and

[b] Bracton lib.  
3 fo. 383, 384.  
Murr. cap. 2.  
sect. 19. Plein  
lib. 6 cap. 6.  
Brit. cap. 161.

[c] Brac- } ubi  
Britton } supra  
Plein }  
Bracton }  
Britton } ubi  
Plein } supra  
Mirror }  
[d] Regist. judi-  
cial. 1. 2. 107.  
43 E. 3. 33.  
24 E. 3. 35.  
3 E. 3. 46  
40 E. 3. 16.  
8 H. 6. 1. b.  
F. N. B. 97.  
[e] Mirror  
Bracton } ubi  
Britton } supra  
Plein }

Register 231.

(4) See further on challenges of jurors  
Kitch. French ed. 91. a. Lamb. Just. ed. of  
1602. p. 579. Dalt. Sher. 1st ed. 120.

Trials per Pa. chap. 9. and title Trial in  
Viner.

and therefore this writ is called a writ of right ; and this in [f] old books is called *dreit dreit* ; and this writ *est darrein remedie de tous recoveries enter tous ordres des fleas* ; and the jury in this writ is called *magna assisa*, or *magna jurata*, as *Littleton* here saith. 2. Writs of right in their nature, as the *rationabili parte*, and *ne injuste vexes*.

“ *De recto.*” *Rectum* is a proper and significant word for the right that any hath, and wrong or injury is in French aptly called *tort* ; because injury and wrong is wrested or crooked, being contrary to that which is right and straight. Now the law that is *linea recta est index sui et obliqui*. And *Britton*\* saith, that *tort a la ley est cantrarye*, and as aptly for the cause aforesaid is injury in English called wrong. And *injuria* is derived of *in* and *jus*, because it is contrary to right ; so as a *faire tort is facere tortum*. And *Fleta* saith, [g] *est autem jus publicum et privatum, quod ex naturalibus præceptis, aut gentium, aut civilibus est collectum ; et quod in jure scripto jus appellatur, id in lege Angliæ rectum esse dicitur*. And in the [h] *Mirror*, and other places of the law, it is called *droit* ; as *droit defend*, the law defendeth.

[159. a.] “ *En le Register.*” *Register* is a most ancient booke of the common law ; and it is two-fold, viz. *registrum brevium originalium*, and *registrum brevium judicialium*. It is a French word, and signifieth a memoriall of writs. Sometimes the register of originall writs is called *registrum cancellaria* ; because all originall writs doe issue out of the chancery, as *extra officinam justiciæ* ; for the antiquity and estimation of which booke I referre the reader to the epistle before the Tenth Part of my Commentaries (1.)

“ *Magna assisa eligenda*” is a judiciall writ to the sherife to returne foure lawfull knights before the justices, there upon their oathes to returne twelve (2) knights of the vicinage to try the mise in a writ of right.

“ *Assise de common de pasture, &c.*” Of what things an *assise of novel disseisin* lay at the common law, and of what by the statute, you may reade at large in my [k] Reports in *John Webbe's* case, where the authorities of law are plentifully cited, and they and the statute well explained. But since *Littleton* wrote, a man may have [l] an assise of *novel disseisin*, *assise of mord'anc'* or any *præcipe quòd reddat, quòd ei deforceat*, writs of dower, or other writs originall, as the case shall require, of tythes, pensions, or other ecclesiasticall or spirituall profit, if he be disseised, deforced, wronged, or otherwise kept or put from the same, which by the lawes and statutes of the realme are made temporall, or admitted to be or abide in temporall hands ; so as by the said act a lay man, having tythes or offerings, may either sue for the subtraction or with-holding of the same in the ecclesiasticall court, or at the common law, at his election. And seeing no speciall writ is given \* by the statute, the party must have a generall writ of *assise de libero tenemento*, and make a speciall pleint. But his *præcipe* must be, *quòd reddat omnes et omnimodas decimas majores, mixtas, et minutas, infra Dale quoquo modo crescen' contingen' ac annuatim*

[f] *Bracton* lib. 5 fo. 372.  
*Britton* fo. 117.  
*Fleta* l. 6. ca. 1.  
*Glanvil* lib. 1.  
 c. 4. s. 8. c. lib. 2.  
 c. 7. lib. 13. ca. 1.  
 (2 Ro. Abr. 686.)

(Post. 266. a.)  
 346. a.)

\* *Britton* fo. 116.  
*Fleta* lib. 2. ca. 1.

[g] *Fleta* lib. 6.  
 ca. 1.

[h] *Mirror* ca. 2.  
 sect. 16. k cap.  
 5. sect. 2.

13 E. 1. ca. 24.  
 Pl. Com. 28. b.

(Cro. Cha. 511.)

[k] 8 Co. 45.

[l] 32 H. 2. ca. 7.

\* 7 E. 6 Dier 83,  
 &c.

(1) See also ant. 16. b. and 73. b.

(2) [See Note 289.]

[m] 44 E. 3. 5.  
 Vid. Regist. 165.  
 Indicavit. W. 2.  
 ca. 5. Conjun-  
 tum fedatis ca-  
 nonicis. Bracton  
 lib. 5. fo. 402.  
 Britton fo. 200.  
 Regist. fo. 34.  
 4 E. 3. 27. 30.  
 16 E. 3. quare  
 imp. 147.  
 Vid. 2 H. 3. tit.  
 Grant 69.  
 (Cro. Cha. 301.)  
 [n] 27 H. 8. of Mo-  
 nasteries not print-  
 ed.  
 31 H. 8. ca. 13.  
 37 H. 8. ca. 4.  
 1 E. 6. ca. 14.  
 1 & 2 Ph. &  
 Mar. ca. 8.  
 2 E. 3. ca. 13.  
 [o] 2 E. 6. ca. 13.

[p] Pasch. 20.  
 Eliz. between  
 the queene and  
 Wood in the ex-  
 chequer, and so it  
 was resolved by all  
 the judges upon  
 conference Mich.  
 4 Ja. regia.

[q] Britton fo.  
 178, 179, &c.  
 Bracton lib. 4.  
 tractat. 3. per  
 totum, fo. 387,  
 &c. Mirror ca.  
 2. sec. 15.  
 F. N. B. 114, &c.  
 [r] Britton ca.  
 90 fo. 222.  
 Bract. lib. 4.  
 fo. 238. Mirror  
 ubi supra.  
 F. N. B. 195.  
 Regist. orig. 30.  
 [s] Bracton fo.  
 245, 246. Britton  
 ca. 94. fo. 234.  
 Mirror ubi supra.  
 F. N. B. 48, 49.

*annuatim renovan'*, or the like, according to his case. [m] But neither assise nor any *precipe* did lye of them as of tythes or any other ecclesiasticall duty at the common law; for the assise brought of the tenth part of all manner of corne growing in an hundred acres of land, after the tythes of the parson taken, was a lay profit *appreñder*, and no ecclesiasticall duty.

But tythes or other ecclesiasticall duties, that came to the crowne by the statutes [n] of 27 H. 8. 31 H. 8. 37 H. 8. and 1 E. 6. are by those statutes and this of 32 H. 8. and of 1 and 2 Ph. & Mariz in the hands of laymen temporall inheritances, and shall be accounted assets; and husbands shall be tenants by the curtesie, and wives endowed of them, and shall have other incidents belonging to temporall inheritances. Onely this ecclesiasticall quality they have that the owner or possessor thereof may sue for the subtraction of the same in the ecclesiasticall court.

But by another [o] statute, remedy is given aswell to the lay person as to the ecclesiasticall person, for subtraction of all manner of prediall tythes; and he shall recover the treble value if they be not justly divided or set forth; and albeit the treble value be not expressly given to the proprietary of the tythes, yet forasmuch as he is the party grieved, and he hath the propertie and interest in the tythes, the treble value is given to him; and whensoever a statute giveth a forfeiture or penaltie against him which wrongfully detaineth or dispossesseth another of his duty or interest, in that case he that hath the wrong shall have the forfeiture or penalty, and shall have an action therefore upon the statute at the common law, and the king shall not have the forfeiture in that case. And so it was [p] adjudged in the exchequer upon conference with other judges in an information for the treble value for not setting out of tythes in *Icelington* in the county of *Cambridge*. (3) And if the proprietary will sue for subtraction of tythes in the ecclesiasticall court, then he shall recover but the double value by the expresse words of the act. Wherein it is to be observed, that the act of parliament doth give a temporall remedy at the common law to parsons and vicars and other ecclesiasticall persons for an ecclesiasticall duty, and to laymen proprietaries of tythes the like remedy; but, as it hath beene said, they have election either to sue for the treble value at the common law, or for the double value in the ecclesiasticall court, or for subtraction of tythes there also. (4).

"*Assise de mord'ancestor*," *Assisa mortis antecessoris*. [q] This writ a man may have after the decease of his immediate ancestor; as where his father, mother, brother, sister, uncle or aunt, dye seised of any lands, and an estranger abate, &c.

"*Assise de darreine presentment*," *Assisa ultima presentationis*, whereof you shall reade [r] plentifully in our bookes.

To these may be added *assisa utrum*, or *juris utrum*, [s] which is the highest writ a parson, vicar, &c. can have for the recovering of the gleebe land, &c. in right of his church. But it may be demanded, wherefore these original writs are called by the speciall name of assises more than other originall writs; and here *Littleton* yeeldeth the reason, because that by these writs it is commanded to the sherife

(3) The same case is more fully stated by lord Coke in 2. Inst. 650. being part of

his comment on the statute of 2 Ed. 6.  
 (4) [See Note 290.]

sherife *quod summoneat* 12, which is as much to say, as to summon a jury. So as in these cases, there is a jury returned the first day, and they are to appeare as soon as the defendant. And because by these writs a jury is to be returned, the law calleth them assises, *ab effectu*; because an assise (which in this sense signifieth a jury) is to be returned. But beside the signification of the writ of assise, whereof *Littleton* here speaketh, it signifieth the whole proceeding upon the writ.

In other originall writs regularly no jury is to be returned before the appearance of the parties and an issue joyned between them; and therefore these other originalls are not called assises.

"*Per un ordinance.*" Here *assise* signifieth an ordinance, &c. Ordinance, *ordinatio*, is derived of the verbe *ordinare*, to ordaine or set in order. And note, an act [r] of parliament (as *Littleton* here proveth) is an ordinance; for it sets downe orders, which are to be kept as lawes: and so is *ordinatio forestæ*, *ordinatio de inquisitionibus*, and *ordinatio contra servientes*, and other statutes many times called ordinances; and it is said almost in every act of parliament, 'Be it therefore ordained, &c. by authority of this parliament;' or the like. But *à converso*, every ordinance is not a statute, as that of S.H. 6. cap. 29. (1) for every statute must be made by the king, with the assents of the lords and commons; and if it appeare by the act, that it was made by two of them onely, it is no statute. (2)

The example put by *Littleton* is *assisa panis et cervisie*. [s] This ordinance was made at a parliament holden anno 51 H. 3. and the like ordinance was made, entituled *assisa cervisie*, which you may see in old *Magna Charta*, fol. 57. b. [t] And so *assisa de Clarendon*, which was in 10 H. 2. and *assisa forestæ* ordained in anno 34 E. 1. and such like. And aptly an ordinance of parliament antiquity hath called an assise, for that an act of parliament doth ordaine such a certaine order, as nothing can be done more or lesse by right. [u] And *Fleta* saith, *et habet rex in potestate sua ut leges et consuetudines et assisas in regno suo provisat et approbatas et juratas*, &c. where assises are taken for statutes, which are the effects of the sessions of parliament.

*De ponderibus et mensuris*, of weights and measures, is a most necessary learning to bee knowne, and daily in use, but it belongeth not to this treatise. In some other (if God so please) somewhat shall be said of them. (3)

## Sect. 235.

**I**TEM, si scilicet seignior et tenant, et le seignior grantat le rent de son tenant per son fait a un autre, savant a luy les services, et le tenant atturnd, c'est un rent secke, come est dit advoant

**A**LSO, if there bee lord and tenant, and the lord granteth the rent of his tenant by deed to another, saving to him the other services, and the tenant atturndeth that

(1) [See Note 291.]

(2) [See Note 292.]

(3) Accordingly lord Coke discourses a little

on these subjects in two other works. See 2. Inst. 41. and 4. Inst. 273.

\* Mag. Chart. ca. 12. and W. 2. c. 48.

[r] 10 H. 3. Nulli teneantur. 30 E. 2. 1. 7. 33 E. 2. 38. 30 E. 2. 7. Reg. orig. 109. 33 E. 2. 4 H. 2. ca. 2. Vid. 4. Co. 2. Hides case.

[s] Mir. ca. 1. sect. 12. & ca. 4. de Ardeis de Ebre. Bract. li. 3. fo. 136. [t] Stanf. fo. 119. Mir. ca. 2. sect. 15. Hoveden 313. Regist. orig. 370.

[u] Flet. li. 1. ca. 17.

*adevant. Mes si le rent a luy soit denie al prochain jour de payment, il ny ad aucun remede; pur ceo qu'il n'avoit de ceo aucun possession. Mes si le tenant, quaut il atturna al grantee, ou apres, voile doner al grantee un denier, ou un maille, &c. en noame de seisin de le rent, donques si apres a le prochein jour de payment le rent a luy soit denie, il avera assise de novel disceisin. Et issint est lou home granta per son fait un annual rent issuant hors de sa terre a un auter, &c. si le grantor adonques ou apres paya al grantee un denier, ou un maille, en noame de seisin de le rent, donques, si apres al prochein jour de payment le rent soit denie, le grantee poet aver assise, ou auterment nemy, &c.*

that is a rent secke, as it is aforesaid. But if the rent be denied him at the next day of payment, he hath no remedie; because that he had not thereof any possession. But if the tenant when he attorned to the grauntee, or afterwards, will give a penie or a halfpenie to the grantee in name of seisin of rent, then if after at the next day of payment the rent bee denied him, he shall have an assise of novel disceisin. And so it is if a man grant by his deed a yearely rent issuing out of his land to another, &c. if the graunter then or after pay to the grauntee a penie, or an halfpennie, in the name of seisin of the rent, then, if after the next day of payment the rent be denyed, the grauntee may have an assise, or else not, &c.

**"ET le tenant attorna."** Here it appeareth, that an attornment (that is, an agreement to the grant) is no seisin of the rent.

**"Il ne ad aucun remede, &c."** which is as much to say, as he hath not any remedy either at the common law, or in any court of equity, which is worthy of observation.

See more of this in the Chapter of Attornment Sect. 565. (4. Co. 10. Post. 316. b. 316. a.)

**"Voile doner al grantee un denier, ou un maille, &c. en noame de seisin de rent, &c."** Here it is to be observed, that payment of any money in name of seisin of the rent, before any rent become due, is a good seisin of the rent to have an assise when it is due; and that, which is given in the name of seisin of the rent, worketh his effect to give seisin, and yet is no part of the rent, nor shall be abated out of the rent: but you shall read more hereof [160. a.] hereafter, Sect. 565.

**"Un denier, ou un maille, &c."** Here by this (&c.) is implied, that so it is of the gift of a sheepe, or an ox, or a ring, or a paire of gloves, or a pound of pepper, or of any valuable thing.

(4. Co. 26. b. 4. Co. 9.)

**"Issint si home grant per son fait un annual rent issuant hors de son terre a un auter, &c."** By this (&c.) is implied, that the grant and deliverie of the deed is no seisin of the rent; and that a seisin in law, which the grantee hath by the grant, is not sufficient to maintaine an assise or any other reall action, but there must be an actual seisin.

## Sect. 236.

**I**TEM, de rent secke home poct aver assise de mortd'ancester, ou briefe de auel ou de cosinage, et tous auters manners d'actions reals, come la case gist, sicome il poct aver d'aucun autre rent.

**A**LSO, of rent secke a man may have an assise of *mort d'auncertor*, or a writ of *avel* or *cosinage*, and all other manner of actions realls, as the case lyeth, as hee may have of any other rent.

**"BRIEFE de auel," Breve de avo.** This writ lieth, where the grandfather or grandmother was seised of any land in fee the day that he died, and an estranger abate, the heire shall have this writ. [w] And if the great grandfather *besaiel, proavus*, or great grandmother, *besaicles, proavia*, be seised, as is aforesaid, and die, &c. the heire shall have a writ *de besaiel, proavo*, or *besaicles, proavia*, &c.

Bract. li. 2. fo. 67. Brit. c. 39. & c. 76. Flet. li. 5. c. 7. 8. &c. F. N. B. 222. [w] 6 E. 2. 24. 7 E. 2. 46. Regist. 226. F. N. B. 221. a. b. Britton ca. 76.

**"Briefe de cosinage," Breve de consanguinitate.** [a] This writ lieth, where the great grandfather's father, *tritavus (id est) tertius avus*, or *abavus (id est) avus avi*, was seised as is aforesaid, or where grandfather's or grandmother's mother, &c. *ut supra*. And so it is of the seisin of the brother of the grandfather's grandfather, &c. (1)

[a] Bract. lib. 2. fo. 67. Brit. c. 39. & c. 76. Flet. l. 5. ca. 7. 8. F. N. B. 221.

**"Rent secke."** And so it is of a rent charge to all respects.

**"Et tous auters manners d'actions reals."** Hereupon some have gathered, that a man shall have a writ of right of a rent secke, or of a rent charge albeit they be against common right. But that, which hath beene said by *Littleton* of an assise of *mortdauncester*, a writ of *avel*, *cosinage*, and other actions realls, is to be understood after seisin had by some of the ancestors of the demandant; for without an actuall seisin or seisin in deed, none of these are maintainable.

15 E. 2. Mand. de non fine 27. 3 E. 2. 36. 4 E. 2. droit 22. F. N. B. 6. 14 E. 4. 5. Diversity des Courts 117. 35 E. 3. Judgm. 226.

[160. b.]

## Sect. 237.

**I**TEM, sont trois causes de disseisin de rent service, scil. rescous, replevin, et inclosure. Rescous est, quaut le seignior en la terre tenus de luy distreine pour son rent arere, si le distres de luy soit rescous, ou si le seignior vient sur la terre, et voile distreyner, et le tenant ou auter home ne luy voile suffer, &c. Replevin est quaut le seignior ad distreine, et replevin

**A**LSO, there be three causes of disseisin of rent service, that is to say, rescous, replevin, and enclosure. Rescous is, when the lord distraineth in the land holden of him for his rent behind, if the distresse be rescued from him, or if the lord come upon the land, and will distreine, and the tenant or another man will not suffer him, &c. Replevin

(1) See the table for the degrees of consanguinity placed before fol. 18.

replevin soit fait de le distresse per  
briefe ou per platint. Enclosure est,  
si les terres ou les tenements sont is-  
sint encloses (1), que le seignior no  
pout venter deins les terres ou tenemens  
pur distreigner. Et la cause, pur que  
tels choses issint faills sont disseisins  
al seignior, est pur ceo, que per tels  
choses le seignior est disturbe de le  
mean per que il doit uoivre et venter  
a son rent, scil. de le distresse. (2)

plevin is, when the lord hath dis-  
trained, and replevin is made of the  
distress by writ or by plaint. En-  
closure is, if the lands and tene-  
ments bee so enclosed, that the lord  
may not come within the lands and  
tenements for to distrein. And the  
cause, why such things so done be  
disseisins made to the lord, is for  
this, that by such things the lord is  
disturbed of the means by which  
hee ought to have come to his rent,  
scil. of the distresse.

(Cro. Jac. 497.  
2 Rep. Abr. 377.  
496, 497.  
Hob. 180. Dy. 341.  
Cro. Cha. 109.  
F. N. B. 101. a.)  
10 E. 3. 5.  
44 E. 3. 20. b.  
20 H. 7. 1. d.  
21 H. 7. 44. d.  
F. N. B. 101. b.  
6 H. 6. Disseisin 9.  
4 E. 2. Am. 43.  
6 E. 1. Bnd. 416.  
W. 2. en. 6. 13 H. 7.  
Kilway 20.  
(Post. 323. a.)

**"RESCOUS,"** *Rescousus*; is here described by Littleton. It  
is an ancient French word coming from *rescourer*, (*id est*)  
*recuperare*, that is, to take from, to rescue or recover. *Rescous* is  
a taking away and setting at liberty against law a distresse taken,  
or a person arrested by the process or course of law. And all is one,  
as to the point of the disseisin, to rescue the distresse after it is taken,  
and before hand to resist and withstand the taking of it; but yet it  
is no rescous, until it be distreyned. And therefore you may make  
sixte disseisins of a rent service; *rescous* of a distresse, resistance to  
distreyn, replevin, (3) inclosure, counterpleading of the title, and  
vouching of a record and failing. If the tenant rescue the distresse,  
and after is disseised of the tenancie, yet the assise lieth against  
him for the disseisin done of the rent by the rescous.

(p) 6 R. 2.  
Rescous 10.  
40 E. 3. 36.  
31 E. 3.  
Rescous 37.  
20 H. 6. 2. b.  
6 E. 4. 98. b.  
7 E. 4. 20.  
4 E. 4.  
34 H. 6. 47.  
F. N. B. 102. E.  
2 H. 4. 21. 10.  
4 E. 6.  
Distress Br. 24.  
59 E. 3. 36.  
59 H. 6. 7. 4 Co. 11.  
Bevil's case.  
8 H. 4. 1.  
(Ante 47. b.  
6 Co. 23.)  
7 H. 4. 24.  
(6 Co. 76.)  
10 E. 3. 45.  
Vid. ut  
Rescous 14.

**"Pur son rent arere."** Here Littleton decideth an ancient  
question in our bookes, [*viz.*] viz. that the rent must be behind, or else  
the tenant may make rescous: for if no rent be behind when the dis-  
tresse is taken, how can the rescous amount to a disseisin of the rent  
when none is due? And so it is, if the tenant resist the lord to dis-  
treine, when there is no rent behind, this can be no disseisin of the  
rent for the cause above sayd, and this (as it appeareth by Littleton)  
holdeth as well in case of a rent service between lord and tenant, as  
in case of a rent charge, &c. And so I heard sir Christopher Wray  
chief justice say, that he had adjudged it. And that which the to-  
nant may do when there is no rent behind, may a stranger doe, if his  
beasts be distrained. If the tenant tender the rent to the lord when  
he is to take the distresse, if notwithstanding the lord will distreyn,  
the tenant may make rescous (4). If the rent of the lord be behind,  
and the lord distreine the cattell of the tenant in the high way within  
his fee, the tenant may make rescous, for that it is de-  
fended by law to distreine in the (1) high way. And [161. a.]  
by the same reason if the lord will distreyn *averia carum*, where  
there is a sufficient distresse to be taken (2) besides, or if the  
lord

(1) enclosed not in L. and M. but in Boh. P.  
and Red.

(2) de le distresse not in L. and M. Boh.  
nor P.

(3) [See Note 293.]

(4) [See Note 294.]

[161. a.]

(1) [See Note 295.]

(2) Acc. ant. 47: a. and there at large in 2.  
Ind. 233.



lord distreyned any thing that is not distreynable, either by the common law, or by any statute, the tenant may make rescous.

*Note*, there is a rescous in deed and a rescous in law. Of a rescous in deed somewhat hath already been spoken. A rescous in law is, when a man hath taken a distresse, and the cattle distreyned as he is driving of them to the pownd goe into the house of the owner, if he that tooke the distresse demand them of the owner, and he deliver them not, this is a rescous in law, and so of the like.

And every word of *Littleton* is materiall, for he saith ;

“*En la terre tenue de luy.*” And therefore if the lord distreyne out of his fee in lands not holden of him, the tenant may make rescous, unless it bee in some speciall cases.

As if the lord come to distreyne cattle which he seeth then within his fee, and the tenant or any other to prevent the lord to distreyne, drive the cattle out of the fee of the lord into some place out of his fee ; yet may the lord freshly follow, and distreyne the cattle, and the tenant cannot make rescous, albeit the place wherein the distresse is taken is out of his fee, for now in judgement of law the distresse is taken within his fee, and so shall the writ of rescous suppose.

But if the lord coming to distreyne had no view of the cattle within his fee, though the tenant drive them off purposely, or if the cattle of themselves after the view goe out of the fee, or if the tenant after the view remove them for any other cause than to prevent the lord of his distresse, then cannot the lord distreyne them out of his fee, and if he doth the tenant may make rescous.

If a man come to distreyne for *damage feasant*, and see the beasts in his soyle, and the owner chase them out of purpose before the distresse is taken, the owner of the soyle cannot distreyne them, and if he doth, the owner of the cattle may rescue them : for the beasts must be *damage feasant* at the time of the distresse ; and so note a diversitie.

There is a diversity [a] betweene a warrant of record and a warrant or an authoritie in law ; for if a *capias* be awarded to the sherife, to arrest a man for felony, albeit the party be innocent yet cannot he make rescous. But if a sherife will, by aauthoritie which the law giveth him, arrest any man for felony which is not guiltie, he may rescue himselfe. (3)

“*Replevin*” [b] is derived of *replegiare*, to redeliver to the owner upon pledges or suretie.

[c] Also to counterplead the plaintife in an assise, by which he is delayed, maketh him that pleadeth it a disseisor. Otherwise it is, if he had pleaded *nul tort*, &c.

“*Encloser*” is here also described, and need no other explication ; for the lord cannot [d] breake open the gates, or breake down the inclosures to take a distresse, and therefore the law accounts it a disseisin. But all these are intended by *Littleton* to be disseisins after an actuall seisin had, and when the reat is behind : otherwise none of these are disseisins at all.

But

(Ant. 47. b.  
F. N. B. 102. C.)  
3 E. 3. Rescous 12.

44 E. 3. 20.  
6 E. 2.  
Rescous 11.  
11 H. 7. 4.  
21 H. 7. 40.  
34 H. 6. 15.  
16 E. 4. 10.  
Ib. 9. fol. 22. In  
case de Avoerie.  
(5 Co. 32.  
Flood. 37. b.  
32. a. 3 Inst. 151.  
Post. 208. b.  
1 Ro. Abr. 671.)

16 E. 4. 10.  
2 E. 2. Avoerie  
123. Ib. 6.  
ubi supra.

[d] 14 H. 7. 20.  
Ib. Jussee de  
Fenes 9.  
(6 Co. 44. a.  
3 Inst. 231.)

[b] Brit. 84. 100.  
Fleta lib. 4.  
cap. 1. Mirror  
cap. 2. sect. 15.  
(Ant. 146. b.)  
[c] 24 Ass. 3.  
25 Ass. 52.  
Fleta lib. 4.  
cap. 1. Britton  
fol. 106.

[d] 10 E. 3. 9.  
40 E. 3. 14.  
7 E. 3. 3.  
11 H. 7. 20.  
8 Ass. 12.  
10 E. 4. 2.

Drest. Wb. 4.  
Sd. 161. 204.  
Britton Sd. 108.  
Fleta Wb. 4.  
cap. 1.

But wherefore should a rescous of the distresse by the party himselfe, or a replevin, which is a redelivery of the distresse by the sherife by the course of law to the partie, be any disseisin of the rent service? *Littleton* doth here yeeld the true reason; because that by the rescue, and by the suing of the replevyn, the lord is disturbed of the meane by the which he ought to have and come to his rent, viz. of the distresse.

[c] 9 Am. 12.  
Mirror ca. 2.  
sect. 15. Brit.  
Sd. 108. 114.  
118. 141.

And so it is of an incloser; for he that disturbs a man of the meane disseiseth him of the thing it selfe, [c] as the turning of the whole streame that runnes to a mill is a disseisin of the mill it selfe.

[f] 20 Am. 17.  
3 E. 4. 2. per  
Litch.  
40 E. 3. 14. b.  
[g] F. N. B. 42. g.  
25 E. 3. 15.  
43 Am. 40.  
43 E. 3. 20.  
Aux. Judg. 16.  
3 E. 4. 15 per  
Moyse.  
3 E. 3. 19.  
(Hob. 206. 206.  
1 Mod. 4. Cro. Eliz. 236. 1 Sd. 463.)

So it is if a man be disturbed to enter and manure his land, [f] this is a disseisin of the land it selfe; for *qui adimit medium dirimit finem*, and *qui obstruit aditum destruit commodum*. [g] And therefore where it is said, that a man shall not be punished for suing of writs in the king's court, be it of right or wrong, it is regularly (4) true, but it fayleth in this speciall case of the writ of replevyn for the cause aforesaid. [h] But *denier* is no disseisin of a rent service without rescous or resistance.

## Sect. 238.

[161. b.]

**ET** sont 4 causes de disseisin de rent charge; scilicet, rescous, replevin, enclosure, et denier; car denier est un disseisin de rent charge, come est avantdit de rent seck.

**A**ND there bee foure causes of disseisin of a rent charge; scilicet, rescous, replevin, inclosure, and deniall; for denyall is a disseisin of a rent charge, as is said before of a rent secke.

Britton ubi  
supra. Fleta  
Wb. 4. cap. 1.

**S**ONT 4 causes de disseisin de rent charge." And you may adde a fifth, viz. resistance to distreine, counterpleading and vouching a record and fayler thereof, as hath beene said before. (1)

14 E. 4. 4.  
24 H. 6. 7.  
3 Am. 5.  
30 E. 3. 9.  
40 E. 3. 26.  
3 E. 6. 25.  
3 E. 3. 76.  
20 Am. 51.  
30 Am. 4.  
40 Am. 3.  
23 E. 1.  
4 Am. 40.  
3 Am. 2.  
3 H. 6. 11.  
18 E. 3.  
Am. 72.  
(Cro. Cha. 307.)

**"Denier."** Deniall is a disseisin of a rent charge, aswell as of a rent secke; albeit he may distreine for the rent charge, aswell as for a rent service. *Nota*, that when bookes say that a detainer of a rent charge or secke is a disseisin, it must be intended upon a demand made. (2)

If there be two joyntenants, and the grantee of a rent charge distreine for the rent, and one of them make rescous, they are both disseisors; (3) for a distresse for the rent is a demand in law, and then the non-payment is a deniall and a disseisin; but he that made the rescous is onely the disseisor with force.

(4) [See Note 297.]

[161. b.]

(1) Ant. 160. b.

(2) This is agreeable to *Littleton's* de-

scription of such a disseisin in Sect. 233. See W. Jo. 414.

(3) See acc. as to attornment by one of two jointenants, Sect. 566.

## Sect. 239.

**ET** deux sont causes de disseisin de rent secke; cestascavoir, denier et enclosure.

**AND** there be two causes of disseisin of a rent secke; that is to say, deniall and inclosure.

**T**HE reason, wherefore inclosure is a disseisin of a rent secke, is because the grantee cannot come upon the land to demand it.

49 E. 3. 14.  
20 Ass. 7.  
30 Ass. 7.  
10 E. 3. 19.  
33 H. 6. 34.  
36 H. 6. 7. b.

## Sect. 240.

**ET** il semble, que il y ad un autre cause de disseisin de tous les trois services avantdits; c'estascavoir, si le seignior soit en alant a la terre tenus de luy pur distreynner pur le rent arere, et le tenant ceo oyant luy encounter, et luy forstala la voy ovesque force et armes, ou luy menace en tiel forme que il ne osast venter a sa terre pur distreiner pur son rent arere pur doubt de mort, ou mutilation de ses members, ceo est un disseisin, pur ceo que le seignior est disturbé de le meane per que il doit venter a son rent. Et issint est, si, per tiel forstalment ou menace, celuy que ad un rent charge ou rent secke est forstalle, ou ne osast venter a la terre a demaunder le rent arere, &c.

**AND** it seemeth, that there is another cause of disseisin of all the three services aforesaid; that is, if the lord is going to the land holden of him for to distreine for the rent behind, and the tenant hearing this encountreth with him, and forestalleth him the way with force and armes, or menaceth him in such forme that hee dare not come to the land to distreine for his rent behinde for doubt of death, or bodily hurt, this is a disseisin, for that the lord is disturbed of the meane whereby hee ought to come to his rent. And so it is, if, by such forestalling or menacing, hee that hath rent charge or rent secke is forestalled, or dare not come to the land to aske the rent behinde, &c.

**"FORSTALLA,"** [\*] forestallamentum, significeth *obtrusionem vie vel impedimentum transitus, &c.*

[\*] Fleta lib. 1. cap. 43.  
49 E. 3. 14.  
49 Ass. 5.  
20 Ass. 40.  
(3 Inst. 194.)

**"Ove force et armes,"** vi et armis.

Force, vis, in [i] the common law is most commonly taken in ill part, and taken for unlawfull violence, for *maximè faci sunt contraria vis et injuria*. And therefore Britton said well, speaking in the person of the king, *nous volons, que tous gentis plus usent jugement que force*. (4) Arma, Armes, in the common law significeth any thing, that a man striketh or hurteth withall.

[162. a.] [k] *Omnes illos dicimus armatos, qui habent cum quo nocere possunt. Telorum autem appellacione omnia, in quibus singuli homines nocere*

[i] Vid. Sect. 431. (Post. 257. b.)

[k] Bracton lib. 4 fo. 163. & H. 3 fol. 144. Fleta lib. 4. cap. 4.

(4) Britt. 116. a.

*nocere possunt, accipiuntur. Sed et quis venerit sine armis, et in ista concertatione ligna sumpsit, fustes et lapides, talis dicitur vis armata: sed et quis venerit cum armis, armis tamen ad deieciendum non usus fuerit, et deiecit, vis armata dicitur esse facta, sufficit enim terror armorum ut videatur armis deieciere. And, armorum quaedam sunt tutitionis (et quod quis ob tutiam corporis sui vel cuiusvis fecerit, justè secisse videtur) quedam facis et justitie, quedam perturbationis facis, et injuria; quedam usurpationis rei alienae.*

Againe, *Armorum quaedam sunt moluta, et quaedam que faciunt brutorum, etc. Arma moluta plagam faciunt; sicut gladius, bisacuta, et hujusmodi, ligna verò et lapides brusuras, orbes, et ictus, etc. To conclude this, it is truly said, that armorum appellatione non solum acuta et gladii et galeae continentur, sed et fustes et lapideae. As the poet saith:*

(3 Inst. 161, 162.)

Virgil L.  
Æneid.

*Jamque faces et saxa volant; furor arma ministrat.*

*Sed vim vi repellere licet, modò fiat moderamine inculpatæ tutiæ, non ad sumendam vindictam, sed ad propulsandum injuriam.*

Bracton lib. 2.  
14. Britton fol.  
10. & 22.  
Fleta lib. 3. c. 7.  
(Post. 253. b.)  
\* See of this in the  
Chapter of Dis-  
seisin.  
40 E. 2. 14.  
40 Ass. 2.  
50 Ass. 40. &c.

*"Pur doubt de mort, et mutilation de ses membres."* For it must not be vague & various timor, sed talis qui cadere possit in virum constantem, et non in hominem vanum et meticulosum, talis enim debet esse metus, qui in se continet mortis periculum et corporis cruciatum. Littleton here saith, it must be for feare of death \* or mutilation of members. *Et nemo tenetur exponere se infortunio et periculo.* (1) And therefore a forestalment with such a menace is a disseisin, not onely (saith Littleton) of a rent service, but also of a rent charge and rent seck. These be all the disseisins of a rent that our author speaks of. See hereafter [I] where a disseisin shall be by way of admittance of the owner of the rent. And Littleton doth adde the binding reason in case of forestalment, because the lord is disturbed of the meane by which he ought to come to his rent, whereof there hath beene spoken sufficient before, (2) as well in case of the rent charge and rent secke, as of the rent service.

[I] Vid. Sect. 240.

*"&c."* Of the (&c.) in the end of this Section, and what is implied therein, sufficient hath beene spoken before.

Now hath Littleton spoken of remedies for the recovery of the arrerages of rents. But since Littleton's time a right profitable statute \* in the 32 yeare of H. 8. hath beene made for the recovery of arrerages of rents in certaine cases where there lay no remedy at the common law, and giveth further remedy in some cases where at the common law there was some (3) remedy; which statute hath beene well and beneficially expounded; and hereupon eight things are to be observed.

\* 32 H. 8. ch. 37.  
(3 Co. 116.  
Dy. 272. b.  
7 Co. 30. b.  
Ant. 162. a.)

1. When Littleton wrote, the heires, executors, or administrators, of a man seised of a rent service, rent charge, rent secke, or fee farme, in fee simple or fee taile, had no remedy for the arrerages incurred in the life of the owner of such rents. But now a double remedy is given to the executors or administrators for payment of debts, &c. viz. either to distreine or to have an action of debt.

\* 4 Co. 49, 50. a.  
Ogden's case.

2. That

(1) See more fully on this subject post. 253. b.

(2) Ant. 161. a.

(3) See as to this point infra note 4. and 162. b. note 1.

2. That the preamble of the statute concerning executors or administrators of tenant for life is to be intended of *tenant pur autre vie*, so long as *cestuy que vie* liveth, (4) who are also holpen by the said double remedy. But after the estate for life determined, his executors or administrators might have had an action of debt by the

[162. b.] common law; but they could not have distreined, which now they may doe by force of this statute; for in that point it addeth [m] another remedy than the common law gave. (1.)

3. If a man make a lease for life or lives, or a gift in taile, reserving a rent, this is a rent service within this statute.

4. The distresse is the more plaine and certain remedy than the action of debt; for the action of debt must be brought against them that tooke the profits when the rent became behinde, or against their executors or administrators; but the distresse may be taken upon the land be it either in the tenant's owne hands or in the hands of any other that claimes by or from him (that is by interpretation under him) by purchase, gift or descent. And these words, *claiming onely by and from him*, are to be understood claiming onely from or under him by purchase, gift, or descent, and not paramount or above him; as the lord by escheate claimeth not under the tenant by purchase, gift, or descent, but by reason of his seigniory, which is a title paramount. (2)

5. If there be lord and tenant, and the rent is behinde, and the lord grant away his seigniory, and dyeth, the executors shall have no remedy for these arrerages: because the grantor himself had no remedy for them when he dyed in respect of his grant, and the statute is (in like manner as the testator might or ought to have done) *Et sic de similibus*; for the act giveth no remedy, when the testator himselfe hath dispensed with the arrerages, or had no remedy when he dyed. (3)

6. If the tenant make a lease for life, the remainder for life, the remainder in fee, the tenant for life payes not the rent due to the lord, the lord dyeth, the tenant for life dyeth: the executors cannot distreine upon him in remainder, because he claimes not by or from the tenant for life. And so it is of a reversion for the cause aforesaid. But if a man grant a rent charge to *A.* for the life of *B.* and letteth the lands to *C.* for life, the remainder to *D.* in fee, the rent is behinde by divers yeares, *B.* dyeth, and after *C.* dyeth: *A.* may distrein *D.* in remainder for all the arrerages, by the latter branch of the statute of 32 H. 8. And this diversity riseth upon the severall pennings of the former branch and of this latter, which you may reade in the statute it selfe, and so expounded and adjudged [o] in *Edridge's* case, and the latter clause giveth the lesser estate the greater remedy.

7. For the arrerages of a *nomine pænæ*, and for reliefe, or for aid *pur faire fits chivaler* or *pur file marier*, this statute \*giveth no remedy. For, for the arrerages of the *nomine pænæ*, the grantee himselfe

(4) [See Note 298.]

[162. b.]

(1) [See Note 299.]

(2) For other cases not within the statute on a like ground, see *Cro. Eliz.* 332. 1. *Leon.*

302. 2. *Vern.* 612. See also on the extent of this branch of the statute *Edridge's* case, 5. Co. 118.

(3) Acc. by *Vaughan* chief justice, in his Reports 40.

40 E. 3.  
Execution 99.  
45 E. 3. lib. 21.  
9 H. 6. 43.  
14 H. 8. 20.  
19 H. 6. 43.  
34 H. 6. 30.  
38 E. 3. Det. 9.  
9 H. 7. 17.  
19 E. 3. Jurisdiction  
22.  
(Cro. Cha. 471. 472.)  
[m] 23 Edw. Dist.  
376.  
(Ant. 145. b.)

20 E. 3. 64.  
11 H. 4. fol. ult.  
Oguel's case ubi  
supra. & 7. Co.  
30. b. *Lillingston's*  
case.

(2. Sid. 20.)

(4. Co. 61.)

[o] 5. Co. 118.  
*Edridge's* case.

\* 40 E. 3. 3. b.  
11 H. 4. 25.  
14 E. 4. 4.

20 H. 7. 1. a.  
23 H. 8.  
Dier 24.

[a] 34. E. 1.  
A. over, 233.  
F. N. B. 122.  
10 H. 6. 11.  
21 H. 6. 8.  
Mich. 32 H. 8.  
Rot. 429.  
Leake's case.  
Og. 1's case ubi  
supra.  
3 E. 3. Debt 157.  
(a. Co. 66.  
Cro. Eliz. 273.)  
[g] W. 1. ca. 30.  
F. N. B. 62. 122.

[r] 26 E. 3. 64.  
10 H. 6. 11.  
(Cro. Jam. 22.)  
\* 22 H. 6. 26.  
F. N. B. 121.  
(Post. 351. b.)

[c] Hill. 17.  
Elix. Rot. 457.  
inter Sharpe &  
Fok. Vide  
Oguel's case  
ubi supra.  
[c] 19 E. 3.  
Jurisdiet. 22.

himself may have an action of debt, and consequently his executors or administrators; and yet the *nomine pene* as an incident to the rent shall descend to the heire. For reliefe the lord cannot have an action of debt, but distreine; but his executors by [h] the common law shall have an action of debt (4), for it is no rent but a casuall improvement of services. For the said aides, if the lord doth levy them, the sonne and the daughter respectively shall have an action of debt against the executors or administrators of the lord, and if they have nothing, then against the heire; but this is by the statute (g) of W. 1. Note, that all manner of arrerages of rents issuing out of a freehold or inheritance, whether they be in money or corne, cattell, fowle, pepper, comine, victuall, spurres, gloves, or any other profit to be delivered or yeilded, and whether they be annuall or every two, three or four yeares, &c. or the like, are within this statute; but work dayes, or any corporall service, or the like, are not within this statute.

8. A feme sole is seised of a rent in fee, &c. which is behinde and unpaid; she taketh husband; the rent is behinde again; the wife dyeth: the husband by the common law should not have the arrerages growne due before the marriage, but for the arrerages become due during the coverture the husband might [r] have an action of debt by the common law. But now this statute \* by a particular clause giveth the husband the arrerages due before marriage, and the said double remedy for the same, that he may distreine for the arrerages growne due during the coverture. So it giveth him that which he could not have before, and further remedy for that which the common law gave him. And so it hath beene [s] adjudged.

The bishop of [t] *Norwich* had the first-fruits of all the clergy within the diocese at every ayoydance; the church became void, and another person became incumbent, who paid the bishop parcell of his first-fruits according to the taxation of the church, and for the rest he had a day given unto him to pay it; the bishop dyed; the residue was not payd, whereupon his executors brought an action of debt: and it is adjudged that no action doth lie, because it is a meere spirituall thing and no lay contract, and therefore the court had no jurisdiction to hold plea of it.

I have beene the longer in the exposition of the said statute, (3) for that it is a generall case, and doth concerne most part of the subjects of England. (6)

### *Finis Libri Secundi.*

(4) Adjudged accordingly in a case in Nov. 43. and Cro. Eli. z. 883. See also acc. ant. 83. a. & b.

(5) In 18 Vin. Abr. 542. most of the cases on this statute since lord Coke's time

will be found distributed according to the several clauses. See also *Gilbert on Action of Debt*, b. 1 chap. 2 & 3.

(6) [See Note 300.]

## THIRD BOOK

OF THE

## FIRST PART

OF THE

## INSTITUTES

OF THE

## LAWS OF ENGLAND. (1)

Chap. I.

Of Parceners.

Sect. 241.

**P**ARCENERS sont en deux maners, c'estascavoir; parceners solonque le course del common ley, et parceners solonque custome. Parceners solonque le course del common ley sont, lou home, ou feme, seisie de certaine terres ou tenements en fee simple ou en taile, n'ad issue forsque files, et devie, et les tenements descendont a les issues (2), et les files entront en les terres ou tenements issint descendus a eux, donques els sont appels parceners, et quaut a files els sont (1)† forsque un heire a lour ancestor. Et els sont appel parceners; pur ceo que per le briefe, que est appel briefe de participatione facienda, la ley eux voet cohercer, que partition serra fait enter eux. Et si sont deux files al queux les terres descendont, donque els sont appels deux parceners; et si sont trois files, donque els sont appels trois parceners; et si quater files, quater parceners; et issint ouster. (2)†

**P**ARCENERS are of two sorts, to wit; parceners according to the course of the common law, and parceners according to the custome. Parceners after the course of the common law are, where a man, or woman, seised of certaine lands or tenements in fee simple or in taile, hath no issue but daughters, and dieth, and the tenements descend to the issues, and the daughters enter into the lands or tenements so descended to them, then they are called parceners, and be but one heire to their ancestour. And they are called parceners; because by the writ, which is called *breve de participatione faciend*, the law will constrain them, that partition shall be made among them. And if there be two daughters to whom the land descendeth, then they be called two parceners; and if there be three daughters, they bee called three parceners; and foure daughters, four parceners; and so forth.

OUR

(1) [See Note 1.]

(2) In L. and M. and in Roh. it is *files* instead of *issues*.

(1) † See below note 3.

(2) † In L. and M. and in Roh. an *&c.* comes in here.

OUR author having treated in his two former bookes, first of estates of lands and tenements, and in his second booke of tenures whereby the same have been holden, now in his third booke doth teach us divers things concerning both of them; as, 1. The qualities of their estates. 2. In what cases the entry of him that right hath may bee taken away. 3. The remedies, and in what cases the same may be prevented, or avoyded. 4. How a man may bee barred of his right for ever, and in what cases the same may be prevented or avoyded.

*Vide Sect. 208.*

For the first, he, having spoken of sole estates, divideth the quality of estates into individued and conditionall. Individued, into coparcenary, joyntenancy, and tenancy in common. Coparcenary into parceners by the common law, and parceners by the custome; and he beginneth his third book with parceners [163. b.] claiming by descent, which, comming by the act of law and right of blood, is the noblest and worthiest meanes whereby lands doe fall from one to another. Conditional, into conditions expresse or in deed, and conditions in law. Conditions in deed, into gages; which he divideth into *vadia mortua*, and *vadia viva*. *Vadia mortua*, so called because either money or land may be lost: and *viva*, because neither money nor land can be lost, but both preserved. Then speaketh he of descents, whereby the entry of him that right hath may be taken away. And next to that of the remedy how to prevent the same, viz. by continuall claim. Then he teacheth, how a man, having a defeasible or an imperfect estate, may perfect and establish the same by three meanes, viz. by release, by confirmation, and attournment, where that is requisite. Having spoken of a descent, being an act in law which taketh away an entry, he doth then speake of a discontinuance, the act of the party, whereby the entry of them that right have shal be taken away. And next unto that he teacheth in what case the same may be avoided by remitter. After he had treated of descents and discontinuances, which take away entries, but barre not actions, lastly, he setteth forth the learning of warranties, (a curious and cunning kind of learning I assure you) whereby both entry, action, and right may be barred, and the remedies how they may be prevented before they fall, and in what cases they may be avoyded after they be fallen. And thus have you an account of the thirteene severall chapters of his third booke. And now his method being understood, let us heare what our author will say unto us concerning parceners.

*"Et quant a files els sont forsqe un heire a lour [a] ancestor."*  
This is false printed; for the originall is, *et quan,ue files els sont, els sont parceners, et sont forsqe un heire a lour auncestor.* (3)

*"Parceners."* [b] *Jus descendit quasi uni heredi propter juris unitatem, sicut sunt plures filii, &c. Et ubi omnes simul et in solidum heredes sunt, plures coheredes sunt quasi unum corpus, propter unitatem juris quod habent.* Whereupon it followeth, that albeit where there bee two parceners [c] they have moities in the lands descended to them, yet are they both but one heyre; and one of them is not the moiety of an heire, but both of them are but *unus heres*.

And it is to be observed, that there is a diversity betweene a descent, which is an act of the law, and a purchase, which is an act of

[a] Bract. lib. 2. fo. 66, 71, &c. & 76. &c. & lib. 2. fo. 443. Brit. fo. 58. 112. 128. 183. 184. 185. 187. 193. Fitz. lib. 5. ca. 9. li. 6. ca. 47. Glouc. li. 7. ca. 3. & li. 23. c. 11. [b] Bract. li. 2. fo. 66. 76. Fitz. ubi sup. Brit. ubi sup. & Statut. de Hili. rib. [c] Vide Sect. 8. vers. 2m.

.. (3) The words are as here corrected by lord Coke both in L. and M. and in Rob.



of the party. [d] For if a man be seised of lands in fee, and hath issue two daughters, and one of the daughters is attainted of felony, the father dieth both daughters being alive; the one moitie shall descend to the one daughter, and the other moitie shall escheat. But if a man make a lease for life, the remainder to the right heires of A. being dead, who hath issue two daughters, whereof the one is attainted of felony; in this case some have said, that the remainder is not good for a moitie, but voyd for the whole, for that both the daughters should have beene (as *Littleton* saith) but one heire. (4)

[164. a.] A man makes a gift in taile, reserving two shillings rent to himselfe during his life, and if he die his heire within age then reserving a rent of twentie shillings to his heires forever; he dieth having issue two daughters, the one of full age, the other within age: in this case the donee shall hold by fealtie onely, insomuch as the one daughter as well as the other is his heire, and both of them (as *Littleton* saith) make but one heire, *ergo*, his heire is not within age, neither is his heire in that case of full age. But if the reservation had been, "and if he die, his heire neither being within age, nor of full age, &c." in this case the reservation had beene good. And if it doth not begin in his next heire, it shall never begin as this case is, for that the precedencie is not performed. [e] But yet if one of them be of age, and the other within age, she shall have her age and other priviledges and advantages that an heire within age shall have; and when they are demandants, for the nonage of the one the paroll shal demurre against them both (1). [f] *Sunt autem plures participes quasi unum corpus in eo quodd unum jus habent; et oportet quodd corpus sit integrum, et quodd in nulla parte sit defectus.* And when the right heire doth claime by purchase, he must be (say they) a compleat right heire in judgement of law. (2) And therefore if lands be given to a man and to the heires females of his bodie, and he hath issue a son and a daughter, and dieth, the daughter shall have the land by descent; but if a remainder be limited to the heires females of the bodie of I. S. and he hath issue a sonne and a daughter, his daughter shall never take it by purchase, for that she is not heire female of the body of I. S. because he hath a sonne.

If a man give lands to another, and to the heires males of his body, upon condition, that if he die without heire female of his bodie, that then the donor shall re-enter, this condition is utterly voyd, (3) for he cannot have an heire female, so long as he hath an heire male.

And as they be but one heire, and yet severall persons; so have they one entire freehold in the land, as long as it remains undivided, in respect of any stranger's *præcipe*. [g] But betweene themselves to many purposes they have in judgement of law severall freeholds; for the one of them may infeoffe another of them of her part, and make liverye. [h] And this coparcenarie is not severed or divided by law by the death of any of them; for if one die, her part shall descend to her issue, and one *præcipe* shall lie against them, for they shall never joyne as heires to severall auncestors in any action auncestrell, but when one right descends from one auncestor:

(4) [See Note 2.]

(2) [See Note 4.]

[164. a.]

(1) [See Note 3.]

(3) As to effect from a condition's being void, see post. 206. a. & b.

[d] *Flota Lib. 3. ca. 9. Flota Lib. 6. ca. 47.*

(Post. 194. b.)

[e] *Tempe E. 1. Age 128. 8 E. 2. Judgement 340. 30 E. 3. 7. 44 E. 3. Age 47. 26 Ass. 65. 13 E. 3. Age 51. 39 Ass. 22. 39 Ass. 25. 57. 34 H. 6. 4. Ass. 17. [f] *Flota Lib. 3. ca. 9. et lib. 6. cap. 47. (1. Co. 103. 2. Ro. Abr. 416.)**

[g] 10 E. 4. 17 E. 3. 46. (Mo. 60.)

[h] 37 H. 6. 2. 19 H. 6. 45. (Post. 196. a.)

ancestor: and then *propter unitatem juris*, though they be in severall degrees from the common ancestor, yet shall they joyne. But the issues of severall coparceners, because severall rights descend, shall never joyne as heires to their mothers; and yet when they have recovered, a writ of partition lieth betweene them.

Wile Sect. 313.

[f] 7 E. 3. 30. 34.  
46 E. 3. 14.  
24 E. 3. 13.  
F. N. B. 231.  
35 H. 6. 23.  
27 E. 3. 89.  
31 H. 6. 14. b.

[k] 37 H. 6. 8.  
9 E. 4. 13. b.  
42 E. 3. 16, 17.  
3. Co. 86. Post.  
196. a. 304. b.)

For example, [i] If a man hath issue two daughters, and is disseised, and the daughters have issue and die, the issue shall joyne in a *præcipe*; because one right descends from the ancestor; and it maketh no difference, whether the common ancestor, being out of possession, died before the daughters or after, for that in both cases they must make themselves heires to the grandfather which was last seised, and when the issues [k] have recovered they are coparceners, and one *præcipe* shall lie against them. And likewise if the issues of two coparceners, which are in by severall descents, be disseised, they shall joyne in assise. But in the same case if the two daughters had bene actually seised, and had been disseised, after their deceases the issues shall not joyne; because severall rights descended to them from severall ancestors: and yet when they have severally recovered, they are coparceners, (4) and one *præcipe* lieth against them, and a release made by one of them to the other is good. And so note a diversitie *inter descensum in capita, et in stirpes*.

(F. N. B. 194. H.)

And the statute of Gloucester, cap. 6. made anno 6 Edw. 1. speaketh *si homo moriatur, &c.* if a man dieth: so as that statute extendeth not but where one dieth, and hath divers heires, whereof one is sonne or daughter, brother or sister, nephew or neece, and the others be in a further degree, all their heires from henceforth shall have their recoverie by writ of mortdauncestor. And this seemeth to me to be the common law; for *Præton*, who writ before this statute, saith, [l] *in casu cum sit assise mortis aecessoris conjungenda cum consanguinitate, sed ad assisam mortis; quia persona, que propinquior, est et facit assisam, et transit ad se personam: et gradum remotiorem ut ubi potius procedat assisa quam præcipe, quia id, quod est magis remotum, non transit ad se quod est magis junctum, sed è contrario in omni casu.* And herewith agreeth the most of our [m] bookes: and two coparceners shall have a writ of *ape*, and by their count suppose the common ancestor to be grandfather to the one, and great grandfather to the other. (5)

[f] Bracton lib. 4.  
244. b. Britton fol.  
181. 182. & 178.  
304. Fl. ta lib.  
8 cap. 1. et 2. &  
9. in fine.

[m] 10 E. 3.  
St. Joynde in  
Action 31.  
7 E. 3. 30. et 34.  
27 E. 3. 89.  
46 E. 3. 14.  
24 E. 3. 13.  
F. N. B. 231.  
Register. Vide  
33 E. 1. Joindre  
in Action 34.  
13 E. 3. ibid. 89.  
tempo E. 2. lib. 35.  
30 E. 1. ibid. 30.  
25 H. 6. 23.  
[n] Bracton lib.  
2. 66. Britton,  
cap. 71. Fl. ta  
lib. 6. cap. 9. et  
6. cap. 47.

I have bene the longer herein, for that this inheritance of coparceners is the rarest kind of inheritance that is in the law.

Furthermore it is to be observed that herein also in case of coparceners, [n] sometimes the descent is *in stirpes* (viz.) to stockes or roots; and sometime *in capita*, to heads. As if a man hath issue two daughters and dyeth, this descent is *in capita*, viz. that every one shall inherit alike, as *Littleton* here saith. But if a man hath issue two daughters, and the eldest daughter hath issue three [164. b.] daughters, and the youngest one daughter, all these foure shall inherit; but the daughter of the youngest shall have as much as the three daughters of the eldest, *ratione stirpium*, and not *ratione capitum*, for in judgement of law every daughter hath a severall stocke or root.

Also if a man hath issue two daughters, and the eldest hath issue divers sonnes and divers daughters, and the youngest hath issue divers daughters, the eldest son of the eldest daughter shall only inherit;

(4) See the like as to jointenants, post. 188. a.

(5) See F. N. B. 197. B.

inherit; for this descent is not *in capita*, but all the daughters of the yongest shall inherit, and the eldest son is coparcener with the daughters of the yongest, and shall have one moitie (viz.) his mother's part; so that men descending of daughters may be coparceners, as well as women, and shall joyntly implead and be impleaded, as is aforesaid.

[o] If there be two coparceners, and the one bring a *rationalibi parte* or a *nuper obiit* against the other, the defendant claime by purchase, and disclaime in the blood, the plaintife shall have a *mortdaucester* against her as a stranger for the whole. (1)

"*Parceners sent en deux manners.*" Here *Littleton* doth divide parceners; and herewith doe agree the ancient bookes of law.

"*Et ils sont appels parceners, &c.*" Parceners, *participes, et diuntur participes, quasi partis capaces, sive partem capaces; quia res inter eas est communis ratione plurium personarum.* This tenancie in the ancient books of law is called *adequatio*, and sometime *familia hirciscunda*, (2) an inheritance to be divided; and many times parceners are called coparceners.

"*Breve de participatione faciendâ.*" This is false printed, (3) and should be *De partitione faciendâ*, (4) a writ whereby the coparceners are compelled to make partition. [p] *Item est alia actio mixta, que dicitur actio familie hirciscundæ; et locum habet inter eos qui communem habent hereditatem, &c. Et locum habet, ut videtur, inter cohæredes, ubi agitur de pro parte sororum; vel inter alios, ubi res inter partes et cohæredes dividi debeat, sicut sunt filius sorores, quæ sunt quasi unus hæres, vel inter plures fratres, qui sunt quasi unus hæres ratione rei quæ divisibilia est inter plures, masculos, &c.*

"*Des terres et tenements.*" It is to be considered of what inheritances daughters shall be coparceners, and how and in what manner partition shall be made betweene them. Wherein it is to be observed, that of inheritances some be entire and some be severall: againe, of entire, some be divisible, and some be indivisible. And here it appeareth by *Littleton*, that parceners take their appellation, because they are compelled to make partition by writ of *partitione faciendâ*; where, note, that *Littleton* alloweth well to finde out the true derivation of words, as often hath beene and shall be observed.

If a villeine descend to two coparceners, this is an entire inheritance; and albeit the villeine himselfe cannot be divided, yet the profit of him may be divided; one coparcener may have the service one day, one week, &c. and the other another day or weeke, &c. And for the same reason a woman shall be endowed of a villeine, as before it appeareth in the Chapter of Dower. (5) Likewise an advowson is an entire inheritance; [q] and yet in effect the

[o] 20 E. 2.  
nuper obi. 14.  
F. N. B. 197.  
7 E. 3. 13.

Bract. lib. 2.  
fo. 60. 71, 82.  
Brit. ca. 71.  
Fleta li. 3. ca. 9.

[p] Regist.  
Orig. 76. 316.  
Regist. Jud.  
80. Brit. ubi  
sup. Flet.  
ubi sup. Bract.  
ubi supra &  
5. Co. 443. b.

(Ant. 32. a.  
180, 181.)

[q] 13 E. 2. tit.  
Quar. Imp. 170.  
17 E. 3. 36.  
Flet. li. 3. c. 9.  
Mirr. ca. 2. sect.  
17.

(1) See post. 175. 242. a.

(2) See the verb *herisco* or *ercisco* used ant. 86. a.

(3) But in L. and M. and in Boh. it is the same.

(4) *Monsieur Houard* derives this writ from the capitulars of the first French kings. 1. Hou. Littl. 318.

(5) Ant. 32. a.

the same may be divided between coparceners, for they may divide it to present by turnes (6).

A rent charge is entire, and against common right; [r] yet may it be divided between coparceners, and by act in law the tenant of the land is subject to severall distresses, and partition may be made before seisin of the rent.

Entire inheritances not divisible, we finde divers in our bookes; and some inheritances that are divisible, and yet shall not be parted or divided between coparceners, as hereafter shall appeare.

[s] If a man have reasonable estovers, as housebote, heybote, &c. appendant to his freehold, they are so entire as they shall not be divided between coparceners. [t] So if a corody uncertaine be granted to a man and his heires, and he hath issue divers daughters, this corodie shall not be divided between them; but of a corodie certaine partition may be made.

[u] Homage and fealtie cannot be divided between coparceners (7). [w] So a pischarie uncertaine, or a common *sauns nombre*, (8) cannot be divided between coparceners, for that would be a charge to the tenant of the soile.—[x] The lord Mountjoy, seised of the mannor of Canford in fee, did by deed indented and inrolled bargain and sell the same to Browne in fee, in which indenture this clause was contained. *Provided alwayes, and the said Browne did covenant and grant to and with the said lord Mountjoy, his heires and assignes, that the lord Mountjoy, his heires and assignes, might dig for ore in the lands (which were greates waists) parcell of the said mannor, and to dig turfe also for the making of allome.* And in this case three poynts were resolved by all the judges. First that this did amount to a grant of an interest and inheritance to the lord Mountjoy, to digge, &c. Secondly, that notwithstanding this grant Browne his heires and assignes might dig also, and [165. a.] like to the case of common *sauns nombre*. Thirdly, that the lord Mountjoy might assigne his whole interest to one, two, or more; but then, if there be two or more, they could make no division of it, but work together with one stocke; neither could the lord Mountjoy, &c. assigne his interest in any part of the waiste to one or more, for that might worke a prejudice and a surcharge to the tenant of the land; and therefore if such an uncertaine inheritance descendeth to two coparceners, it cannot be divided between them. (1)

But then it may be demanded, what shall become of these inheritances? The answer is, that it appeareth in our bookes, that regularly [y] the eldest shall have the reasonable estovers, common, pischarie, corody uncertaine, &c. and the rest shall have a contribution, that is, an allowance of the value in some other of the inheritance, and so of the like. But what if the common ancestor left no other inheritance to give any thing in allowance, what contribution or recompence shall the younger coparceners have? It is answered, that if the estovers or pischarie or common be uncertaine, then shall one coparcener have the estovers, pischarie, or common, &c. for a time, and the other for the like time; as the one for one yeare, and the other for another, or more, or lesser time, whereby

no

[p] 44 E. 2. th.  
F. artic. 6. & th.  
A. 11. 75.  
(3 H. 6. fol. 11.  
Ant. 149. a.)

[q] 2 E. 2. th.  
Dower 123.

[r] 1 E. 2.  
super obit 12.  
20 E. 2. libd. 11.  
S. Martin Dier 123.

[u] 17 E. 3. 72.  
[w] 13 E. 2.  
Quare Imped.  
170. Fleta lib.  
2. ca. 9.  
[x] Mich. 24  
et 25 Eliz. inter  
Comitem de Huntingdon et Seignior  
Mountjoy.  
(Ibid. 174.)

(Ant. 122. a.  
L. Saund. 361.)  
Vide S. Martin  
Dier 123.  
(Noy. 148. Cra.  
Jam. 266, 267.  
1. Mod. 74.)

(6. Co. 1.)

[y] 2 E. 2.  
dower 123.  
13 E. 2. quar.  
imp. 170.  
Fleta ubi supra.  
Vide Mirror  
cap. 2. sect. 17.

(6) See an instance of a partition of an advowson between joyn tenants in Carth. 305.

(7) See ant. 67. b. and Dav. Rep. 61. b.

(8) Acc. as to common *sauns nombre*, ant.

149. a. See the note on this sort of common, ant. 122. a.

[165. a.]

(1) [See Note 5.]

no prejudice can grow to the owner of the soile. Or in case of the pischary, the one may have one fish, and the other the second, &c. or the one may have the first draught, and the second the second draught, &c. And if it be of a park, one may have the first beast, and the second the second, &c. And if of a mill, one to have the mill for a time, and the other the like time; or the one one toll dish, and the other the second, (2) &c. And this appeareth to be the ancient law; for it is said [z] *Sunt alie res hereditarie que veniunt in partitionem, que, cum dividi non possunt, conceduntur uni; ita quod alie coheredes alibi de communi hereditate habeant ad valorem, sicut sunt vivaria, piscarie, parci; vel saltem quoddam partem habeant pro defectu, sicut secundum piscem, tertium vel quartum; vel secundum tractum, tertium vel quartum. Item, in parciis secundum, tertiam aut quartam bestiam.*

[z] Bracton lib. 2. 76. Britton cap. 71. 72. Fleta lib. 6. cap. 9.

But now let us turne our eye to inheritances of honor and dignity. And of this there is an ancient booke case [\*] in 23 H. 3. tit. *partition* 18. in these words: Note, if the earledome of Chester descend to coparceners, it shall be divided betweene them as well as other lands, and the eldest shall not have this seigniorie and earledome entire to herselfe; *quod nota, adjudged per totam curiam.* (3) By this it appeareth, that the earledome (that is, the possessions (4) of the earledome) shall be divided; and that where there bee more daughters than one, the eldest shall not have the dignity and power of the earle, that is, to bee a countesse. What then shall become of that dignity? The answer is, [a] that in that case the king, who is the soveraigne of honour and dignity, may for the uncertainty conferre the dignity upon which of the daughters he please. And this hath bene the usage since the Conquest, as it is said. (6)

(Ant. 18. b. 27. a.)  
[\*] 23 H. 3. tit. *partition* 18.

But if an earle that hath this dignity to him and his heires dieth, having issue one daughter, the dignity shall descend to the daughter; for there is no uncertainty, but onely one daughter, and the dignity shall descend unto her and her posterity, as well as any other inheritance. And this appeareth by many precedents, and by a late judgement given in *Samson Leonard's* case, who married with *Margaret* the only sister and heire of *Gregory Fines* lord Dacre of the South, and in the case of *William lord Ros.* (7)

[a] 3 H. 3. tit. *prescription* (5).

But there is a difference betweene a dignity or name of nobility, and an office of honor. For if a man hold a manor of the king to be high constable of *England*, and dye having issue two daughters, the eldest daughter taketh husband, he shall execute the office (8) solely, and before marriage it shall be exercised by some sufficient deputy: and all this was resolved by all the judges of *England*, in the case of [b] the duke of *Buckingham*. But the dignity of the crowne of *England* is without all question descendible to the eldest daughter alone, and to her posterity, (10) and so hath it bene declared by act of parliament, [\*] For, *regnum non est divisibile*. And so was the descent of *Troy*:

[b] 11 Eliz. Dier 265. the duke of Buckingham's case. (9)  
[\*] 25 H. 8. cap. 23.

*Præterea sceptrum, Ilione quod gesserat olim  
Maxima naturam Priami.*—————

Virgil l. *Æneid.*

If

(2) How dower is to be assigned out of indivisible inheritances, see ant. 32. a.

(3) See Dav. Rep. 61. b.

(4) [See Note 6.]

(5) Fitz. Abr. *partition* 36.

(6) [See Note 7.]

(7) [See Note 8.]

(8) [See Note 9.]

(9) S. C. Keilw. 170. b. 4. Inst. 127.

(10) See ant. 15. b.

[b] *Emmen lib. 2. fol. 70. Plon lib. 2. cap. 6.*

[c] *Emmen 100. 107.*

*Vide Sect. 66.*

[c] 20 B. 4. parsonage 70.  
[d] Co. 13. b.  
[d] *Idem, Emment lib. 2. fol. 84. Rot. 84. (Ant. 118. a.)*

[b] If a castle that is used for the necessary defence of the realme, descend to two or more coparceners, this castle might be divided by chambers and rooms, as other houses be. But yet, for that it is *pro bono publico et pro defensione regni*, it shall not be divided: for as one saith, *propter jus gladii dividi non potest*; and another saith, [c] *par le droit del espee que ne souffre division en aventure que la force del realme ne defaillie par taunt.* But castles of habitation for private use, that are not for the necessary defence of the realme, ought to bee parted betwene coparceners as well as other houses; and wives may thereof be endowed, as hath bene said in the Chapter of Dower. (11)

If there be two coparceners of certaine lands with warranty, and they make partikon of the land, the warranty shall remaine; because they are compellable to make partition. [165. b.]

[c] But otherwise it was of joyntenants at the common law, as shall be said hereafter in his proper place.—[d] *Thomas de Eberston*, seized of the manor of *Eberston* within the forest of *Pickering*, had kept time out of mind a woodward for keeping of the woods parcell of that manor, and had the barke of all the trees felled in the said woods by any of the forresters of that forest as belonging to his manor (which he could not have without a prescription). (1) *Thomas of Eberston* infeoffed two of the said manor; betwene whom partition was made, so as one of them had the one halfe in severalty, and the other the other halfe. (2) *Robert Wyerne* afterwards had the one halfe, and *Thomas Thurnise* the other; and they in the eyre of *Pickering* claimed to keepe a woodward within the said woods, and the barke aforesaid; and the truth hereof and the usage being specially found by the forresters verderors and regardors, *Willoughby Hungerford* and *Hanburie* justices itinerants within that forrest gave judgment as followeth. *Idco consideratum est, quod predicti Robertus et Thomas habeant woodwardum et corticem in bosco predicto de quercubus predictis sibi et heredibus suis imperpetuum. Salvo semper jure, &c.*

## Sect. 242.

**AUXY**, si home seisie de tenements en fee simple ou en fee taile deoy sauns issue de son corps engender, et les tenements descendent a ses soers, els sont parceners, come est avantdit. Et en meeme le maner, lou il n'ad pas soers, mes les tenements descendent a ses aunts, els sont parceners, (3) &c. Mes si home n'ad forsque une fille, el ne poit estre dit parcener, mes il est appelle fille et heire, &c.

**ALSO**, if a man seized of tenements in fee simple or in feotayle dieth without issue of his bodie begotten, and the tenements descend to his sisters, they are parceners, as is aforesaid. And in the same manner, where he hath no sisters, but the lands descend to his aunts, they are parceners, &c. But if a man hath but one daughter, she shal not be called parcener, but shee is called daughter and heira, &c.

“OU

(11) Ant. 31. b.

(2) [See Note 11.]

(3) *Els sont parceners* not in L. and M. nor Rob.

[165. b.]

(1) [See Note 10.]

**O**U en fee taile." This must be intended of an estate taile made to the father and to the heires of his body; for otherwise if the state taile were made to a man and to the heires of his body, his sisters cannot inherit. And not only daughters shall be coparceners, but sisters, aunts, great aunts, &c.

"*File et heire, &c.*" Here by (*&c.*) is implied sister and heire, aunt and heire, great aunt and heire, and so upward.

## Sect. 243.

**E**T est assavoir, que partition entre parceners peut estre fait en divers maneres. Un est, quant ils agreeont de faire partition, et font partition de les tenemens; si comme si soyent deux parceners, a divider entre eux les tenemens en deux parts, chascun part par soy en severallie et d'egal value; et si sont 3 parceners, a divider les tenemens en trois parts par soy en severallie, &c.

**A**ND it is to bee understood, that partition may be made in divers maners. One is, when they agree to make partition, and do make partition of the tenements; as if there bee two parceners to divide between them the tenements in two parts, each part by it selfe in severalty and of equall value; and if there bee three parceners, to divide the tenements in three parts by it selfe in severalty, &c.

**B**Y this Section, and the (*&c.*) in the end of it, it is to be understood, that there are two kind of partitions between coparceners; the one in deed or expresse, and the other in law or implicate. Of partitions in deed or expresse, some bee voluntary, whereof *Littleton* enumerates foure manners; and one compulsory, that is, by writ of partition. (4)

(Am. 46. a.)

[166. a.] The first partition in deed between coparceners, is that which *Littleton* here speaketh of, viz. *Quant ils agreeont et font partition de les tenemens, &c. chascun part par soy en severallie et de egal value, &c.* If coparceners make partition, at full age and unmarried, and of *sane memorie*, of lands in fee simple, it is good and firme for ever, albeit the values be unequal; but if it be of lands entailed, or if any of the parceners be of *non sane memorie*, it shall bind the parties themselves, but not their issues unless it be equal; or if any be *covert*, it shall bind the husband, but not the wife or her heires; or if any be within age, it shall not bind the infant; as shall be said more fully hereafter (1). The second partition followeth in the next Section. And here the (*&c.*) implyeth further, that if there be foure parceners, then foure parts, if five, five parts, and so forth. It further implyeth, that all this must be in severalty; whereof, and with what limitations this is to bee understood, it hath beene declared before.

(P. R. 107.)

Vide Sect. 251.

(4) [See Note 12.]

[166. a.]

(1) See post. Sect. 255. to 258. inclusive: See also 173. b.

## Sect. 244.

**U**N autre partition est, a eslier, per agreement enter eux, certaine de leur amies, de faire partition des terres ou tenements en le forme avantdit. Et en tiels cases, apres tiel partition, le eigne fle prymement esliera un des parties issint dioides, que il voit aver pur sa part, et donques la second fle procheine apres luy autre part, et donques la tierce soer autre part, donques le quarte autre part, &c. si issint soit que soient plusors soers, &c. si ne soit aulrement agree enter eux. Car il poit estre agree enter eux, que un avera tiels tenements, et un autre tiels tenements, &c. sans ascun tiel primer election, &c.

**A**NOTHER partition there is, viz. to choose, by agreement betweene themselves, certaine of their friends, to make partition of the lands or tenements in forme aforesaid. And in these cases, after such partition, the eldest daughter shall choose first one of the parts so divided, which she will have for her part, and then the second daughter next after her another part, and then the third sister another part, then the fourth another part, &c. if so bee that there bee more sisters, &c. unlesse it bee otherwise agreed betweene them. For it may be agreed betweene them, that one shall have such tenements, and another such tenements, &c. without any primer election.

31. Am. 26.

**“DONQUES le quarte autre part, &c.”** Here the (&c.) implyeth the 5 sister, and after her the 6, and so forth.

**“Car il poet estre agree enter eux, que un avera tiels tenements, et un autre tiels tenements, &c.”** Here by this (&c.) is implied divers rules of law proving the conclusion of *Littleton* in this Sect. viz. *Modus et conventio vincunt legem. Pacto aliquid licitum est, quod sine pacto non admittitur. Quilibet potest renunciare juri pro se introduct.* but with this limitation that these rules extend not to any thing, that is against the common-wealth or common right. *For conventio privatorum non potest publico juri derogare.*

(1. Sid. 192. 269.  
Cro. Eliz. 664.)  
(1. Sid. 339.)

## Sect. 245.

[166. b.]

**E**T la part, que l'eigne soer ad, est appelle en Latin enitia pars. Mes si les parceners agreeont, que l'eigne soer ferra partition de les tenements en le forme avantdit, et si ceo il fait, donque il est dit, que l'eigne soer esliera puis darreine pur sa part, et apres chescun de ses soers, &c. (1)

**A**ND the part which the eldest sister hath, is called in Latine enitia pars. But if the parceners agree, that the eldest sister shall make partition of the tenements in manner aforesaid, and if she doe this, then it is said, that the eldest sister shall choose last for her part, and after every one of her sisters, &c.

“**ENITIA**

(1) The &amp;c. not in L. and M. nor Rob.



**"ENITIA pars."** It is called in old bookes\* *cisnetia*, which is derived of the French word *cisne* for eldest, as much as to say the part of the eldest; for *Bracton* saith, *quodd cisnetia semper est preferenda propter privilegium etatis: sed esto, quodd filia primogenita relicto nepote vel nepte in vita patris vel matris, decesserit, preferenda erit soror antenata tali nepoti vel nepti quantum ad cisnetiam, quia mortem parentum expectant.* And herewith agreeth *Fleta* also, *quod nota*: whereby it appeareth, that *enitia pars* is personall to the eldest, and that this prerogative or privilege descendeth not to her issue, but the next eldest sister shall have it. [f] And here is a diversity to be observed betweene this case of a partition in deed by the act of the parties, for there the privilege of election of the eldest daughter shall not descend to her issue; and where the law doth give the eldest any privilege without her act, there that privilege shall descend. As if there be divers coparceners of an advowson\*, and they cannot agree to present, the law doth give the first presentment to the eldest; and this privilege shall descend to her issue; nay her assignee shall have it; (2) and so shall her husband, that is tenant by the curtesie, have it also (3).

*"Donques il est dit l'eigne soer eslicra plus darraine, &c."* By this and the &c. in the end of this Section is implied, the rule of law is, *cujus est divisio, alterius est electio.* And the reason of the law is for avoyding of partiality.

*(Ipsæ etenim leges cupiunt ut jure regantur)*

which might apparently follow if the eldest might both divide and choose (4). Now followeth the third partition in deed.

## Sect. 246.

**UN** autre partition ou allotment est, sicome soient quater parceners, et apres le partition de les terres fait, chescun part del terre soit per soy solement escript en un petit escrovet, et soit couvert tout en cere en le maner d'un petit pile, issint que nul poit veier l'escrovet, et donque soient les 4 piles de cere mis en un bonnet a garder en les maines d'un indifferent home, et donques l'eigne file primerment mettra sa maine en le bonnet, quel prendra un pile de cere ovesque le scrovet deins mesme le pile pur sa part, et donques le second soer mettra sa maine en le bonnet et prendra un autre, le tierce soer le 3 pile,

**A**NOTHER partition or allotment is, as if there be foure parceners, and after partition of the lands be made, every part of the land by itselfe is written in a little scrowle and is covered all in waxe in manner of a little ball, so as none may see the scrowle, and then the 4 balls of waxe are put in a hat to bee kept in the hands of an indifferent man, and then the eldest daughter shall first put her hand into the hat, and take a ball of waxe with the scrowle within the same ball for her part, and then the second sister shall put her hand into the hat and take another, the 3 sister the 3 ball, and the

\* Bract. li. 2. 77.  
Fleta lib. 3. ca. 9.  
Britton ca. 72.

[f] 45 E. 3.  
Sines 41. 19 E. 2.  
quar. imp. 69.  
19 E. 2. lib. 170.  
5 H. 6. 10.  
30 H. 6. 9.  
Doct. & Stud. 116,  
117. Vid. Bract.  
232. 240.  
\* 5 H. 7. 2.  
34 H. 6. 40.  
11 H. 4. 44.  
20 E. 3. quar.  
imp. 63. 34 E. 3.  
lib. 193.  
16 E. 3. Dar.  
Presentment 11.  
17 E. 3. 20, 21.  
21 E. 3. 21.  
F. N. B. 22.  
(Port. 13. b.)

(2) [See Note 13.]

(3) Agreed by lord Anderson in the case from Cro. Eliz. cited in the preceding note.

(4) See Hob. 107. where the doctrine is cited with approbation.

*pile, et le 4 oer le 4 pile, &c. et en  
ces cas oerient chascun de eux luy  
tenir a sa chance et allotment.*

the 4 sister the 4 ball, &c. and in  
this case every one of them ought  
to stand to their chance and allot-  
ment.

\* Flot. lib. 3. ca. 9.  
Buckton lib. 2. 78.  
Racion cap. 78.

Vide Numbers ca.  
xvii. ver. 54, 55. &  
ca. xxviii. ver. 54.  
of division by lot.

**"ALLOTMENT:"** Of this partition by lots ancient au-  
thors \* write, that in that case coparceners *fortunam faciunt  
judicem*. And *Littleton* here tearmeth it chance; for in the end  
of this Section he saith, that in this case every of them ought to  
hold herselfe to her chance; and of this kinde of division you shall  
read in holy scripture, where it is sayd, *dedi vobis possessionem  
quam dividetis sorte*.

The &c. in the end of this Section implyeth, that if there be more  
coparceners there must be more balls according to the number of the  
parceners.

## Sect. 247.

**I**TEM, un auter partition il y ad.  
*Sicome sont qualer parceners, et  
ils ne voient agreer a partition d'es-  
tre fait enter eux, donque l'un poit  
aver brief de partitione facienda en-  
vers les auters trois, ou deux d'eux  
poient aver brief de partitione faci-  
enda envers les auters deux, ou trois  
de eux poyent aver brief de parti-  
tione facienda envers le quart, a leur  
election.*

**A**LSO, there is another partition.  
As if there bee foure parceners,  
and they will not agree to a parti-  
tion to bee made betweene them,  
then the one may have a writ of  
*partitione faciendā* against the other  
three, or two of them may have a  
writ of *partitione faciendā* against  
the other two, or three of them  
may have a writ of *partitione faci-  
enda* against the fourth, at their  
election.

**H**ERE followeth the fourth partition in deed. *Littleton* having  
spoken of voluntary partitions, or partitions by consent: now  
he speakes of a partition by the compulsory means of law where no  
partition can be had by consent. Now of what inheritance partition  
may be made by the writ of *partitione faciendā* may partly appeare  
by that which hath beene sayd. Moreover it is to bee observed that  
the words of the writ *de partitione faciendā* be, \* *quodd cum eadem  
A. et B. insimul et pro indiviso teneant tres acras terra cum perti-  
nen'*, &c. And note that this word (*tenet*) (1) in a writ doth alwayes  
imply a tenant of a freehold. And therefore [g] if one coparcener  
maketh a lease for yeaeres, yet a writ of partition doth lie (2). But  
if one or both make a lease for life, a writ of partition doth not lye  
betweene them: because *non insimul et pro indiviso tenent*, they  
doe not hold the freehold together, and the writ of partition must be  
against the tenant of the freehold. [A] If one coparcener disseise  
another, during this disseisin a writ of partition doth not lie be-  
tweene them; for that *non tenent insimul et pro indiviso*.

But

(1) See the various applications of the  
verb *tenet* explained ant. fol. 1. a. & b.

(2) [See Note 14.]

[g] 21 E. 3. 27.  
7. H. 3. 28. b.  
23 H. 6. 2.  
31 H. 4. 8.  
4 H. 7. 10. b.  
(Post. 170. b.)  
[B] 4 H. 7. 9.  
21. Ass. 23.  
(Post. 167. b.  
167. a.)

\* 3 E. 3. 47. 48.

But there be other partitions in deed then here have been mentioned. [i] For a partition made between two coparceners, that the one shall have and occupy the land from *Easter* untill the first of August only in severalty by himselfe, and that the other shall have and occupy the land from the first of August untill the feast of *Easter* yearly to them and their heires, this is a good partition (3). Also if two coparceners have two manors by descent, and they make partition, that the one shall have the one manor for one yeare, and the other the other manor for this yeare, and so *alternis vicibus* to them and their heires, this is a good partition. The same law is, if the partition be made in forme aforesaid, for two or more yeares, and each coparcener have an estate of inheritance, and no chattell, albeit either of them *alternis vicibus* have the occupation but for a certaine terme of yeares.

[167. b.]

Of partitions in law, some be by act in law without judgement, and some be by judgement, and not in a writ de *partitione faciendd.* And of these in order.

[k] If there be lord, three coparceners mesnes, and tenant, and one coparcener purchase the tenancy, this is not onely a partition of the mesnalty, being extinct for a third part, but a division of the seignory paramount, for now he must make severall avowries (1).

[l] If one coparcener make a feoffment in fee of her part, this is a severance of the coparcenarie, and severall writs of *præcipe* shall lie against the other coparcener and the feoffee (2).

[m] If two coparceners be, and each of them taketh husband and have issue, the wives die, the coparcenary is divided, and here is a partition in law.

[n] If two coparceners be, and one disseise the other, and the disseisee bringeth an assise, and recover, it hath beene said, that she shall have judgement to hold her moiety in severalty. And this seemeth (say they) verie ancient, and thereupon vouch *Bracton*, \* *si res fuerit communis locum habere poterit communi dividendo judicium.* And [o] so (say they) if the one coparcener recover against another in a *nuper obiit*, or a *rationabili parte*, the judgement shall be, that the demandant shall recover and hold in severalty. But *Britton* is to the contrary ; for he saith, \* *et si ascun des parceners soit enget ou disturbe de la seisin per ses auters parceners, un, ou plusieurs, al disseisee viendra assise per severall pleint sur les parceners et recovers, mes nemy a tener en severaltie, mes en common selonque ceo que avant le siss, &c.* [h] And this seemeth reasonable : for he must have this judgement according to his plaint, and that was of a moiety, and not of any thing in severaltie, and the sherife cannot have any warrant to make any partition in severalty or by metes and bounds.

[i] *Tempe R. 1.*  
partition 21.  
F. N. B. ca. 1.  
(7 Co. 4.)

[k] 36 H. 6. 7.  
(Post. 102. a.)

[l] 37 H. 6. 8.  
45 E. 3. 1.

[m] 17 E. 3. 14, 15.

[n] 12 E. 3.  
Judgm. 102.  
7 Ass. 10.  
7 E. 3. 40.  
10 Ass. 17.  
12 Ass. 5. 17.  
10 E. 3. 40. 43.  
28 Ass. 35.  
25 Ass. 13.  
20 E. 3. Ass. 62.  
3 E. 3. 43. b.  
19 H. 6. 46.  
7 H. 6. 4.  
3 E. 4. 10.  
\* *Bract. lib. 4.*  
fo. 216. b.  
[o] 3 E. 3. 46.  
21 E. 3. cit.  
*nuper obiit.*  
4 H. 7. 10.  
30 E. 1. *nuper obiit.*  
16.  
F. N. B. 2. b.  
\* *Britton fol. 112.*  
a.  
[p] 6 Co. 12, & 13.  
*Morrice's case accord.* (Post. 157. a.)

(3) See the case of a moveable fee simple, stated ant. fol. 4. a. [167. b.]  
(1) [See Note 15.]  
(2) [See Note 16.]

## Sect. 248.

**E**T quant judgment sera done sur tiel brief, le judgment serra fait; que partition serra fait enter les parties, et que le vicount en son proper person alera a les terres et tenements, &c. et que il per le serement de xii. loyals homes de son bailiwick, &c. ferra partition enter les parties, et que l'un part de mesmes les terres et tenements soyent assignes al plaintiff ou a l'un des plaintiffs, et un autre part a un autre parcener, &c. nient feasant mention en le judgement de l'eigne soer plus que de puisne.

**A**ND when judgement shall be given upon this writ, the judgement shall be thus; that partition shall be made betweene the parties and that the sherife in his proper person shall go to the lands and tenements, &c. and that he by the oath of 12 lawfull men of his bailiwick, &c. shall make partition between the parties, and that one part of the lands and tenements shall be assigned to the plaintiff or to one of the plaintiffs, and another part to another parcener, &c. not making mention in the judgement of the eldest sister more than of the youngest.

Bract. fo. 66, &c.  
Brit. 71, &c.  
Brit. ca. 72.  
Fleta lib. 3. ca. 9.

**N**OTE, the first judgement in a writ of partition, whereof Littleton here speaketh, is *quod partitio fiat inter partes predictas de tenementis predictis, cum pertinentiis*, after which judgement. By this, &c. viz. *tenements, &c.* is implied, that a writ shall be awarded to the sherife, *quod assumptis tecum 12 liberis et legalibus hominibus de vicinato tuo, per quos rei veritas melius sciri poterit, in propriam personam tuam accedas ad tenementa predicta cum pertinentiis, et ibidem per eorum sacramentum, in presentia partium (3) predictarum per te promuniendarum si interesse voluerint, predicta tenementa cum pertinentiis per sacramentum bonorum et legalium hominum predictorum, habito respectu ad verum valorem eorundem, in duos partes equales partiri et dividi, et unam partem partium illarum, &c.*

This last &c. in this Section is evident.

"Judgement," *Judicium est quasi juris dictum*, so called because so long as it stands in force *pro veritate accipitur* (1) and cannot be contradicted. And thereupon antiquitie called that excellent booke in the exchequer, *Domesday, Dies judicii*. *Sicut enim districti et terribilis examinis illa novissima sententia nulla tergiversationis arte valet eludi, &c. sic sententia ejusdem libri inficiari non potest, vel impune declinari; ob hoc nos eundem librum judicarium nominamus, &c. quod ab eo sicut a predicto judicio non licet ullâ ratione discedere.* By Littleton it appeareth, that the formes of judgements, pleas, and other legall proceedings, doe conduce much to the right understanding of the law and of the reason thereof; as here Littleton rightly collecteth upon the forme of the judgement, that the sherife shall deliver to them such parts as he thinkes good, and that the eldest coparcener shall have no election when partition is made by the sherife. And it is to bee observed, that there bee two judgements

Ookam ca. quid sit liber judicarius. (4)  
40 E. 3. 45.  
9 Am. 2.  
8 Am. 35.  
40 E. 3. 2.  
Regist.  
F. N. B. 16.

(3) [See Note 17.]

(4) See Dialog. de Scaccar. lib. 1. cap. 16. which hath the same title.

[168. a.]

(1) See same explanation of *judicium*, ant. 39. a.

ments in a writ of partition. Of the former *Littleton* speaketh in this place. And when partition is made by the oath of twelve men, and assignement and allotment thereof, and so returned by the sherife, then the latter judgement is, *ideo consideratum est, quod partitionis predicta firma et stabilis imperfectum teneatur*, and this is the principall judgement. [q] And of the other, before this be given, no writ of error doth lie. (2)

"Shireve" is a word compounded of two Saxon words, viz. *shire*, and *reve*. *Shire*, *satrapia*, or *comitatus*, commeth of the Saxon verbe *shiran*, i. e. *partiri*, for that the whole realme is parted and divided into shires; and *reve* is *prefectus*, or *prepositus*; so as *shireve* is the *reve* of the shire, *prefectus satrapie*, *provincia*, or *comitatus*. And he is called *prefectus*, because he is the chiefe officer to the king within the shire; for the words of his patent be, *commisimus vobis custodiam comitatus nostri de, &c.* And he hath a threefold custodie, *triplicem custodiam*, viz. First, *vita justitie*; for no suit begins, and no processe is served but by the sherife. Also he is to returne indifferent juries for the triall of mens lives, liberties, lands, goods, &c. Secondly, *vita legis*: hee is, after long wuits and chargeable, to make execution, which is the life and fruit of the law. Thirdly, *vita reipublice*; he is *principalis conservator pacis*, within the countie, (3) which is the life of the common wealth, *vita reipublice pacis*.

He is called before, Sect. 234. *viscount*, in Latyne, *vicecomes*, i. e. *vice comitis*, that is, in stead of the earle of that countie, who in antient time had the regiment of the countie under the king. For it is said in the *Mirror*,\* that it appeareth by the ordinance of antient kings before the Conquest, that the earles of the counties had the custodie or gard of the counties, and when the earles left their custodies or gards, then was the custodie of counties committed to viscounts, who therefore (as it hath bene sayd) are called *vicecomes*. And *Ockam*, cap. *quid centuria*, &c. *porro vicecomes dicitur, quod vicem comitis suppleat*.

*Marculphus* saith, this office is *judiciaria dignitas*; *Lampridius*, that it is *officium dignitatis*. *Fortescue* saith, *quod vicecomes est nobilis officarius*. And see there, and observe well his honourable and solemne election and creation at this day. But to confirme all that hath bene said touching this point, and to conclude the same, among the lawes of *Edward the Confessor* (4) I finde it thus recorded. *Verum quod modò vocatur comitatus olim apud Britones temporibus Romanorum in regno isto Britannia vocabatur consulatus et qui modò vocantur vicecomites tunc temporis vice-consules vocabantur; ille verò dicebatur viceconsul, qui consule absente ipsius vices supplebat in jure et in foro.* (5) Herein many things are worthy of observation. First, for the antiquitie of counties. Secondly, that which wee called *comitatum*, the Romanes more latinely called *consulatum*. Thirdly, whom the Saxons afterwards called (as hath bene said) *shireve* or *earle*, the Romanes called *consul*. Fourthly, that the sherife was deputy of the consull or earle: and therefore the Romanes called him *viceconsul*, as we at this day call him *vicecomes*

[q] 11. Co. 40. Hall. 39. Rot. 337. in Benke le Roy inter An. Countes de War. & le Seignior Berkley. (Fortesc. 63. Ant. 58. a. 109. b.)

\*Vide the Second Part of the Institutions. W. 1. c. 70.

\* Mirror cap. 1. sect. 3.

\*Ockam cap. Quid Centur. &c.

Fortescue cap. 26. 14. 2. cap.

Lambert fol. 129. 13.

(2) [See Note 18.]

coroner is so stiled.

(3) See Lamb. Just. ed. of 1602. p. 12, 13. and 2. Inst. 174. in both of which books the

(4) [See Note 19.]

(5) [See Note 20.]

Com. Roll. 12.  
Huntingdon.  
Foliot. inter  
Reg. Melm. 12.  
Mort. 12. 2.

*vicecomes*. Fifthly, that the sherife in the Romanes time, and before, was a minister to the king's courts of law and justice, and had then a court of his owne, which was the county court, then called *curia consularis*, as appeareth by these words, *ipsius vices supplebat in iure et in foro*. Sixtly, that this realme was divided into shires and counties, and those shires into cities, burroughes, and townes, by the Brittaines; so that king *Alfred's* division of shires and counties was but a renovation or more exact description of the same. (6) Lastly, the consequence that will follow upon these things being so ancient, (as in the time of, and before the Romanes) the studious reader will easily collect. And afterwards, fol. 135. amongst the lawes of the same king it appeareth, that those whom the Saxons sometimes called (and now we call) *aldermen* or *eorles*, the Romanes called *senatores*, *et similiter olim apud Britones temporibus Romanorum in regno isto Britannie vocabantur senatores, qui postea temporibus Saxonum vocabantur aldermani, non propter etatem, sed propter sapientiam et dignitatem, cum quidam adolescentes essent, jurisperiti tamen et super hoc experti.* (7)

"*De son Bayliwicke.*" It appeareth before, that the enquest must be *de vicineto* of the place where the lands [168. b.] doe lie, and not generally *de balivâ tud.* By this it appeareth, that the sherife is *balivus*, and his county called *baliva*; and therefore it is good to be seen what *balivus* originally signified, and whereof it is derived.

Hist. lib. 2. cap. 67.  
(Cro. Jam. 178.  
Flood. 20. b.  
1. Ro. Abr. 339.)  
Ernest. lib. 2.  
tract. 2. cap. 33.  
ms. 3. Idem lib.  
3. fo. 151. b.

*Baylife* (1) is a French word, and signifies an officer concerned in the administration of justice of a certaine province; and because a sherife hath an office concerning the administration of justice within his county or bailiwick, therefore he called his county *baliva sua*. For example, when he cannot find the defendant, &c. he returneth, *non est inventus in balivâ mea*.

Ernest. lib. 3. 156.  
b. Brit. fo. 50.  
Flet. lib. 2. ca. 61.  
(10. Co. 103.  
Post. 192. a.)

I have heard great question made, what the true exposition of this word *balivus* is. In the statute of *Magna Charta*, cap. 28. the letter of that statute is, *nullus balivus de cetero ponat aliquem ad legem manifestam nec ad juramentum simpliciter loquela sua sine testibus fidelibus ad hoc inductis*. And some have said, that *balivus* in this statute signifieth any judge; for the law must be waged and made before the judge. And this statute (say they) extends to the courts of common pleas, king's bench, &c. for they must bring with them *fideles testes*, &c. and so hath bene the usage to this day.

Glanv. lib. 1. ca. 9.

But I have perused a very ancient and learned reading upon this statute; and the reader taketh it, that, at the common law before this statute, he, that would make his law in any court of record, must bring with him *fideles testes*. And this opinion herein is warranted by *Glanvil*, who wrote in the reign of *Henry* the second. But the reader holdeth, that in the courts which were not of record, (2) as the county court, the hundred court, the court baron, &c. there the defendant without any faithfull witnesses might before this stat. have made his law, for remedy whereof this act was made; and therefore (saith he) the statute extendeth to the judges of such courts as are not of record. In 10 H. 4. it is holden that

10 H. 4. 4.  
(Cro. Jam. 381. 384.)

(6) [See Note 21.]

(7) [See Note 22.]

ditional references in the margin on the side of the word *bailiff* relate to *bailiffs of manors*.

(2) Concerning the distinction of courts of record, see ant. 117. b.

[168. b.]

(1) See ant. 61. b. at the bottom. The ad-

that if a lord, that hath a franchise in a leet, doth not enquire of things enquirable, and punish them, the sherife shall enquire in his turne, *et si le vicount ne faire en son torne, le baylie le roy enquirer' quant il vient, ou autrement serra inquisie per justice en eire*, where *baylie le roy* is understood *justice le roy*. And in the *Mirror*\* it is holden, that the statute doth extend to everie justice, minister of the king, steward, &c. and all comprehended under this word *baylife*.

The chiefe magistrates in divers antient corporations are called baylifs, as in Ipswich, Yarmouth, Colchester, &c. And *baylife* in French is *diacetes, nomarcha*, in English, a bailife or governor. But of this thus much shall suffice.

\* *Mirr.* ca. 5.  
sect. 2. VI.  
*Bract.* fo. 409.  
*Flet.* II. 2.  
ca. 68. 56.

## Sect. 249.

**E**T de la partition que le vicount ad issint fait, il ferra notice as justices (3) south son seale et les seales de chescun de les 12, &c. Et issint en ceo case poies veier, que l'eigne socer n'avera my la primer election, (4) mes le vicount luy assignera sa part que il avera, &c. Et poit estre que le vicount doit assigner primerment un part a le plus puisne, &c. et darrenement a l'eigne, &c.

**A**ND of the partition which the sherife hath so made, he shall give notice to the justices under his seale, and the seales of every of the 12, &c. And so in this case you may see, that the eldest sister shall not have the first election, but the sherife shall assigne to her her part which shee shall have, &c. And it may be that the sherife will assigne first one part to the youngest, &c. and last to the eldest, &c.

**"SOUTH son seale, &c."** Note, the partition, made and delivered by the sherife and jurors ought to bee returned into the court under the seale of the sherife, and the seales of the twelve jurors; for the words of the judiciall writ of partition, which doth command the sherife to make partition, are *assumptis tecum 12, &c.* (so as there must be twelve) *et partitionem inde, &c. scir' facias justiciariis, &c. sub sigillo tuo, et sigillis eorum per quorum sacramentum partitionem illam feceris, &c.* And this is the reason, wherefore in this case the partition, which they make upon oath ought to be returned under their seales: and the reason of that is for the more

*Brit. fo. 107. b.*  
*acc. Bract.* l. 2.  
*fo. 71, &c.* *Flet.*  
l. 5. ca. 9.

[169. a.] strengthening of the partition by the 12, and that the sherife should not returne what partition he would. Now after all this, this (&c.) viz. 12, &c. doth imply, that the principall judgement upon the partition so returned is, *ideo consideratum est per curiam quod partitio firma et stabilis imperpetuum teneatur.* (1) The latter two (&c.) are evident. (2)

*Lib. 11. fol. 60.*  
*in Metcalf's case.*

(3) In L. and M. and in Boh. there is an &c. here.

(4) An &c. here in L. and M. and in Boh.

[169. a.]

(1) See acc. ant. 168. a.

(2) [See Note 23.]

## Sect. 250.

**ET** nota, que partition per agreement percenter parceners poit estre fait per la ley enter eux, auxibien per parol sans fait, come per fait.

**A**ND note, that partition by agreement betweene parceners may bee made by law betweene them, as well by paroll without deed, as by deed. (3)

[r] 3 E. 4. 9, 10.  
9 E. 4. 30.  
11 H. 4. 3.  
9 H. 4. partition  
13. 31 E. 3. 38.  
(Dr. 350. b. Post.  
187. a. 198. b.)

[s] Vide Sect.  
350. 3 H. 4. 1.  
19 H. 6. 25.  
38 H. 6. 2.  
3 E. 4. 9, 10.  
47 E. 3. 28.  
47 Am. 1.  
19 H. 6. 1.  
17 R. 3. 46.  
30 Am. 8. Hb. 4.  
76. 75. Hb. 6.  
16. 12. 13.  
3 H. 7. 4. Dier  
18 Hb. 358.  
31 H. 8. Dier 44.  
3 EHz. Dier 170.  
28 H. 8. Dier  
20. 1 Mar.  
Dier 98.  
(1 Leon. 103.  
6 Co. 12.  
3 Co. 42.  
Post. 180. a. 193. b.  
200. b. 335. a.  
2 Inst. 403.)

**H**ERE it appeareth, that [r] not onely lands and other things that may passe by livery without deed, but things also that do lie in grant, as rents commons, advowsons and the like, that cannot passe by grant without deed, whether they bee in one county or in severall counties, may be parted and divided by paroll without deed. [s] But a partition betweene joyntenants is not good without deed, albeit it be of lands, and that they be compellable to make partition by the statutes of 31 H. 8. cap. 10. and 32 H. 8. cap. 32. because they must pursue that act by writ *de partitione faciendâ*; and a partition betweene joyntenants without writ remains at the common law, which could not be done by paroll. And so it is and for the same reason of tenants in common. But if two tenants in common be, and they make partition by paroll, and execute the same in severalty by livery, this is good, and sufficient in law. And therefore where bookes say, the joyntenants made partition without deed, it must be intended of tenants in common and executed by liverie.

*Nota*, betweene joyntenants there is a two-fold privy, viz. in estate and in possession: betweene tenants in common, there is privy onely in possession, and not in estate: but parceners have a threefold privy, viz. in estate, in person, and in possession.

## Sect. 251.

**I**TEM, si deux meases descendent la deux parceners, et l'un meuse vault per un 20<sup>s</sup>. l'auter forsque 10<sup>s</sup>. per an, en cest cas partition poit estre fait enter eux en tiel forme; c'est a sçavoir, que un parcener avera l'un mease, et que l'auter parcener avera l'auter meuse; et celui qui avera le mease qui est de valeur de 20<sup>s</sup>. et ses heires payeront un annuell rent de v. s. issuant hors de meisme le mease a l'auter parcener et a ses heires a tous jours, pur ceo que chescun de eux auroit ovelty en valeur.

**A**LSO, if two meases descend to two parceners, and the one mease is worth twenty shillings per annum, and the other but ten shillings per annum, in this case partition may bee made betweene them in this manner; to wit, the one parcener to have the one mease, and the other parcener the other mease; and she which hath the mease worth 20 shillings per annum and her heires shal pay a yeerely rent of five shillings issuing out of the same mease to the other parcener and to her heires for ever, because each of them should have equality in value.



## Sect. 252.

**ET** tiel particion fait per parol est assets bone; et mesme le parccner, que avera le rent, et ses heires, purront distreiner de commen droit pur le rent en le dit mease de le value de 20s. si le rent de 5s. soit aderere en ascun temps, en quecunque mains que mesme le mease deviendra, coment que ne fuit unques ascun escripture de ceo fuit enter eux de tiel rent.

**AND** such partition made by paroll is good enough; and that parccner, who shall have the rent, and his heires, may distrein of common right for the rent in the sayd mease worth twenty shillings, if the rent of 5 shillings be behinde at any time, in whose hands soever the same mease shall come, although there never were any writing of this made betweene them for such a rent.

**“PER parol.”** Nota, here [t] a rent may be granted for owelty of partition without (4) deed, even as a rent in case of a lease for yeares, for life, or a gift in taile, may bee reserved, without deed; and so may a rent be assigned to a woman out of the land, whereof she is dowable, &c. without deed. But albeit an exchange for lands in the same county may be without deed; yet a rent granted for equality (5) of the same exchange cannot be without deed. And the cause of the difference is apparent; for coparceners are in by descent, and compellable to make partition.

[t] 2 E. 3. 14.  
21. Ass. p. 1.  
21 E. 3. 32.  
11 H. 4. 61.  
46 E. 3. 21.  
2 H. 6. 14.  
21 H. 6. 11.  
1 Mar. Dier. 91.  
(Ant. 34. b.)  
(Mo. 20.)

**“Le rent, &c.”**

[169. b.] The same law is of common of estovers, or a corodie, or a common of pasture, &c. or a way granted upon the partition by the one coparcener to the other. All which and the like, albeit they lie in grant, yet upon the partition may they be granted without deed.

**“Issuant hors de meame le mease, &c.”** [x] For if it be granted out of other lands, then descended to the coparceners, then there must be a deed. [z] But if the rent be granted generally (out of no land in certaine) for owelty of partition, *pro residuo terræ*, it shall bee intended out of the purpartie of her that granteth it.

[x] 1 Martin  
Dyer 91.  
[z] 20. Ass. 22.  
20 E. 3. 9. b.  
Pl. Com. 34.  
(Post. 252. b.)

[a] If there be three coparceners, and they make partition, and one of them grant twenty shillings *per annum* out of her part to her two sisters and their heires for equality of partition, the grantees are not joyntenants of this rent; but the rent is in nature of coparcenary, and after the death of the one grantee the moiety of the rent shall descend to her issue in course of coparcenary, and not survive to the other, for that the rent doth come in recompence of the land, and therefore shall ensue the nature thereof; and if the grant had beene made to them two of a rent of twenty shillings, viz. to the one ten shillings, and to the other ten shillings, yet shall they have the rent in course of coparcenary, and joyne in action for the same.

[a] 15 H. 7. 14.  
20. Ass. 23.  
20 E. 3. 9. b.  
(A. Co. 2. a.  
Wyndham's case.  
3. Co. 22. b.  
Hob. 172.  
Post. 177. b.)

If

(4) [See Note 25.]

(5) Of equality in exchanges, see ant. 50. b. 51. a. & b.

[b] 20. Am. 22.  
20 E. 3. 6.  
17 E. 3. 10.

[b] If one coparcener be married, and for owelty of partition the husband and wife grant a rent to the other two out of the part of the fem covert, this partition being equall shall charge the part of the fem covert for ever.

[c] 20 E. 3.  
20. b.

[c] If two coparceners by deed indented alien both their parts to another in fee, rendring to them two and their heires a rent out of the land, they are not joyntenants of this rent, but they shall have the rent in course of coparcenary ; because their right in the land, out of which the rent is reserved, was in coparcenary.

[d] 1 Marib  
Dyer 91. s. E. 3.  
16. and other the  
bookes abovesaid.

“ *Purront distreiner de common droit, &c.*” That is, [d] in this case the law doth give a distresse, lest the grantee should be without remedy, for the which upon the partition she hath given a valuable recompence in land, which descended, &c. And so in the case of dower abovementioned. (1)

## Sect. 253.

**E**N *mesme le maner est de tous maners de terres et tenements, &c. lou tiel rent est reservee a un ou a divers parceners sur tiel partition, &c. Mes tiel rent n'est pas rent service, mes est rent charge de common droit* (1) *ewe et reservee pur egalite de partition* (2).

**I**N the same manner it is of all manner of lands and tenements, &c. where such rent is reserved to one or to divers parceners upon such partition, &c. But such rent is not rent service, but a rent charge of common right had and reserved for equality of partition.

“ **T**ERRES *et tenements, &c.*” Here (*&c.*) implyeth a caution, viz. that they be such lands and tenements out of which a rent for egalite of partition may be granted, [170. a.] whereof sufficient hath beene said before.

“ *Reservee al un.*” Here reservation is taken for a grant ; and if it be used upon the partition, doth amount in this case to a grant, which is worthy the observation.

## Sect. 254.

**E**T *nota, que nulles sont appellees parceners per le common ley, mes females ou les heires de females, que veignent a terres et tenements per discent: car si soers purchase terres ou tenements, de ceo ils sont appellees joyntenants, et nemy parceners.*

**A**ND note, that none are called parceners by the common-law, but females or the heires of females, which come to lands or tenements by discent: for if sisters purchase lands or tenements, of this they are called joyntenants, and not parceners.

This needs no explanation.

(1) See ant. 34. b. 153. a. and Sheph. Comm. Assur. 425.

[170. a.]  
(1) See ant. 153. a. note 1.  
(2) In L. and M. &c. here.

## Sect. 255.

**I**TEM, si deux parceners de terres en fee simple font partition entre eux, et la part de un vault plus que le part de l'auter, si els fueront al temps de la particion de pleine age, scil. de 21 ans, donques la particion tous dits demurrera, et ne serra unques defeat. Mes si les tenements (dont els font particion) soyent a eux en fee taile, et le part que l'un ad est melieux en annuall value que est la part le l'auter, coment que els sont concludes durant leur vies a defeat la particion; uncore si le parceners, que ad le meinder part en value, ad issue et devy, l'issue poit disagree a la particion, et enter et occupier en common l'auter part que fuit allotte a sa aunt, et issint l'auter poit enter et occupier en common l'auter part allotte a sa soer, &c. si come nul partition ust este fait. (1) †

**A**LSO, if two parceners of land in fee simple make partition between themselves, and the part of the one valueth more then the part of the other, if they were at the time of the partition of full age, *sc.* of 21 yeares, then the partition shall alway remaine, and be never defeated. But if the tenements (whereof they make partition) be to them in fee taile, and the part of the one is better in yearly value then the part of the other, albeit they be concluded during their lives to defeat the partition; yet if the parceners, which hath the lesser part in value, hath issue and dye, the issue may disagree to the partition, and enter and occupy in common the other part which was allotted to her aunt, and so the other may enter and occupy in common the other part allotted to her sister, &c. as if no partition had beene made.

**"DONQUES le partition tous dits demurrera, &c."** Hereby it appeareth, that the inequality of the value shall not impeach a partition made of lands in fee simple betweene coparceners of full age, (3) no more then it shall doe in case of an exchange. (4)

9 H. 6. 5. and other the bookes above-said.

**"Ils sont concludes durant leur vies."** This inequall partition doth so conclude the parceners themselves, as shee that hath the unequall part shall not avoid it during her life.

**"Concludes."** This word is derived of *con* and *claudio*, (5) and in this sense signifieth to close or shut up her mouth that she cannot speake to the contrary.

(Post. 362. a.)

[170. b.] Husband and wife tenants in speciall taile of certaine lands in fee have issue a daughter, the wife dyeth, the husband by a second wife hath issue another daughter, both the daughters enter (where the eldest is only inheritable) and make partition: the eldest daughter is concluded during her life to impeach the partition, or to say that the youngest is not heire, and yet she is a stranger to the taile, but in respect of privity in their persons

11 Ass. p. 2.

See after the chapter of Garr. (3) (Doctor & Stud. 65.)

(3) Ant. acc. 166. a.

(4) Ant. 51. a.

(5) Acc. ant. 37. a.

[170. b.]

(1) † [See Note 26.]

(2) See the case of discontinuance stated by lord Coke post. 373. b.

persons the partition shall conclude, for a partition between meere strangers in that case is voyd, but the issue of the eldest shall avoid this partition as issue in taile.

[g] 31 E. 3. 34.  
32. 3 E. 2.  
Bastardy 19.  
31 Am. 52.  
30 Am. 7.  
77 E. 3. 59.  
(3 Co. 161. b. Post.  
244. b.)

[g] *I. S.* seised of lands in fee hath issue two daughters, *Rose* and *Anne*, bastards eigne and *mulier suiens*, and dieth. *Rose* and *Anne* doe enter and make partition. (3) *Anne* and her heires are concluded for ever. (4)

## Sect. 256.

**I**TEM, si deux parconers de tene-  
ments en fee preignent barons, et  
ils et leur barons font partition enter  
eux, si la part l'un est meinder en an-  
nual value que la part l'auter, du-  
rant les vies leur barons la particion  
estoyera en sa force. Mes coment que  
il estoyera durant les vies les barons,  
encore apres la mort le baron, celuy  
feme, que ad la meinder part, poit  
enter en la part sa socr come est  
avantdit, et defeatera la particion.

\* 43 Am. 28.  
3 E. 4. 4.  
9 E. 3. 38.  
15 E. 4. 30.  
7. N. B. 63.  
39 Am. 23.  
9 H. 6. 1.  
43 Am. 14.

“*ELS et leur barons.*” Here it appeareth, that the wife must be party to the partition, and so are the bookes \* to bee intended that speake of this matter.

“*Et defeatera la particion.*” Note, the partition shall not be defeated for the surplusage onely to make the partition equall, but here it appeareth that it shall bee avoyded for the whole. But of this more shall be said hereafter in this chapter, *sectione* 264.

[h] And though the partition be unequall, yet is not the particion voyd, but voydable; for if after the decease of the husband, the wife entereth into the unequall part, and agreeth thereunto, this shall binde, and therefore *Littleton* used the word [*defeatra,*] which proveth it to bee voydable. [171. a.]

## Sect. 257.

**M**ES si le partition fait perenter  
les barons (1) fuit tiel, que ches-  
cun part al temps d'allotment fait  
suit de egall annual value, donque  
il ne poit apres estre defeat en tielx  
cases.

**B**UT if the partition made be-  
tweene the husbands were thus,  
that each part at the time of the al-  
lotment made was of equall yearly  
value, then it cannot afterwards be  
defeated in such cases.

“*PERENTER*”

(3) [See Note 27.]  
(4) [See Note 28.]

[171. a.]

(1) Instead of *les barons* it is *eux* in L. and M. and Roh.

**P**ERENTER *les barons.*" This is mistaken, for the originall is *parenter eux*, that is, betweene the barons and fens, and not as it is here betweene the barons, therefore this error would be hereafter reformed.

*"Al tempo del allotment."* Hereby it appeareth, that if the parts at the time of the partition bee of equall yearely value, neither the wives nor their heyres shall ever avoyd the same; and the reason hereof is, for that the husbands and wives were compellable by law to make partition, and that which they are compellable to doe in this case by law, they may doe by agreement without processe of (2) law. If the annuall value of the land be equall at the time of the partition, and after become unequall by any matter subsequent, as by surrounding, ill husbandry, or such like, yet the partition remaines good,

9 H. 6. 5. and  
other the book  
abovesaid.  
(Post. 179.)

*Judicis officium est, ut res ita tempora rerum,  
Querere; quanto tempore tutus eris.*

But if the partition be made by force of the king's writ, and judgement thereof given, it shall binde the fem-coverts for ever, albeit the parts be not of equall annuall value; because it is made by the sherrife by the oath of twelve men by authority of law; and the judgement is, that partition shall remaine firme and stable for ever, as hath beene said. [a] But a partition in the chancery where one coparcener is of full age, and sueth livery, and one other is within age and hath an unequall part allotted to her, this shall not binde her at full age; for in a writ directed to the escheator to make partition, there is a *salvo jure*, and there is no judgement upon such a partition. But if such a partition be equall, it shall binde, so that a part of the land holden *in capite* bee allotted to every of the coparceners, for to that end there is an expresse *proviso* in the writ. [b] And this partition may be avoided either by *scire fac* in the chancery, or by a writ *de partitione faciendâ* at the common law at her full age. (3)

[a] F. N. B.  
265, 269, 269, 281,  
282, 283.  
9 H. 6. 6.  
21 E. 3. 31.

[b] Vide  
21 E. 3. 21.

## Sect. 258.

**I**TEM, si deux parceners sont, et le puisne estant diens l'age de 21 ans, et partition est fait enter eux, issint que la purpartie que est allot al puisne est de meindre value que la purpartie l'auter, en cest case le puisne, durant le temps de son nonage, et auxy quauant el vient a pleine age, scil. de 21 ans, poit enter en la purpartie a sa soer allot, et defeatera la partition. Mes bien soy gard tiel parcener quant el vient a sa plein age, que el ne preigne a son use de meisme tous les profits des terres ou tenemens

**A**LSO, if two coparceners be, and the yongest being within the age of twenty-one yeares, partition is made betweene them, so as the part which is allotted to the youngest is of lesse value than the part of the other, in this case the youngest, during the time of her nonage, and also when shee commeth to full age, scil. of 21 yeares, may enter into the part allotted to her sister, and shall defeat the partition. But let such parcener take heed when she comes to

(2) [See Note 29.]

(3) Acc. F. N. B. 281 H.

*tenements que a luy furent allots ; car donques el soy agreeu a le partition a tiel age, en quel case la partition esloyera et demurra en sa force. Mes peraventure les profits de la moitie el poit prender, relinquisant les profits de l'auter moitie a sa soer. (1)*

peradventure she may take the profits of the moitie, leaving the profits of the other moitie to her sister.

[c] 43 Am. 14.  
9 H. 6. f. 6.  
7 E. 3. 13.  
8 E. 3. 24.  
10 H. 4. f.  
31. Am. 16.  
21 H. 6. 22.  
(1. Ro. Abr.  
234. Hob. 179.)

**A**S before in the case of the fem-covert, [c] so it is in the case of the infant ; for if the partition be equall at the time of the allotment, it shall binde him for ever, because he is compellable by law to make partition, and he shall not have his age in a *partitione faciendā* ; (2) and though the partition be unequal, and the infant hath the lesser part, yet is not the partition void but voidable by his entry ; for if he take the whole profits of the unequall part, after his full age, the partition is made good for ever. And therefore *Littleton* here giveth him a caveat, that in that case he take not the whole profits of his unequal part, neither shall an unequall partition in the chancery binde an infant, as appeareth before. (3) But a partition made by the king's writ *de partitione faciendā* by the sherife by the oath of twelve men, and judgement thereupon given, shall binde the infant, though his part be unequal, *causā quā supra*.

## Sect. 259.

**E**T est ascavoîr, que quant il est dit, que males ou females sont de pleine age, ceo serra entendue d'age de 21 ans; car si devant tiel age aucun fait ou feoffement, grant, release, confirmation, obligation, ou auter scripture, soit fait per aucun de eux, &c. ou si aucun deins tiel age soit baylife ou receiver a aucun home, &c. tout serce pur nient, et poit estre avoyde. Auxy home devant le dit age ne serra my jure en un enquest, &c. (1) †

**A**ND it is to be understood, that when it is said, that males or females be of full age, this shall be intended of the age of 21 yeares ; for if before such age any deed or feoffement, grant, release, confirmation, obligation, or other writing, bee made by any of them, &c. or if any within such age bee baylife or receiver to any man &c. all serve for nothing, and may be avoyded. Also a man before the sayd age shall not be sworne in an enquest, &c.

\* Vid. Sect. 402, 403.  
(3. Inst. 673.  
F. N. B. 192. g.  
Fest. 246. a. 337.  
b. 250. a. & b.  
260. a. Ant. 171. a.  
2. Co. 44. b.)

**T**HE law hath provided for the safety of a man's or woman's estate, that \* before their age of twentie one yeares they cannot binde themselves by any deed, (4) or alien any land (5), goods, or chattells (6).

“ Age

(1) In L. and M. and Rob. an &c. here.

(2) [See Note 30.]

(3) See the case of partition of an advowson between coparceners, where one is within age, in F. N. B. 36. D.

(4) See 288. 51. b. note 2. and 52. a. note 2.

To the references there add 3. P. Wim. 228.

(5) [See Note 31.]

(6) [See Note 32.]

(1) † No &c. in L. and M. nor Rob.

"*Age de 21 ans.*" Before this age a man or woman is called an enfant.

"*Fait,*" *Factum, Anglicè* a deed, and signifieth in the common law, an instrument consisting of three things, viz. writing, sealing, and delivery, comprehending a bargain or contract between party and party, man or woman. It is called of the civilians *literarum obligatio*.

Brit. fo. 65, 66.  
& 101.  
Flet. ii. 2. ca. 14.  
(Perk. sect. 136.)

[172. a.] "*Feoffment.*" Of this word sufficient hath bin sayd before in the first chapter of the first booke.

"*Grant,*" *Concessio*, is in the common law a conveyance of a thing that lies in grant and not in livery, which cannot passe without deed; as advowsons, services, rents, commons, reversions, and such like. Of this also sufficient likewise hath beene said in the first chapter of the first booke.

Lib. 3. fol. 63. in  
Lincolne Colledge  
case.

"*Release, confirmation, &c.*" Of these shall bee spoken hereafter in their proper places and chapters.

"*Obligation,*" is a word of his owne nature of a large extent; but it is commonly taken in the common law, for a bond containing a penalty, with condition for payment of money or to do or suffer some act or thing, &c. and a bill is most commonly taken for a single bond without condition.

"*Ou auter scripture soit fait per aucun de eux, &c.*" Here by this &c. is implied some exceptions out of this generality, [d] as an infant may bind himselfe to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himselfe afterwards: but if he bind himselfe in an obligation or other writing with a penalty (2) for the payment of any of these, that obligation shall not bind him. [e] Also other things of necessity shall bind [him], as a presentation to a benefice, (3) for otherwise the laps shall incurre against him. Also if an infant be an executor upon payment of any debt due to the testator, hee may make an acquittance; but in that case a release without payment is voyd (4): and generally whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law. (5) But of this common learning this little tast shall suffice.

[d] 18 E. 4. 2.  
21 H. 6. 3.  
lib. 2. fol. 67.  
Finchon's case.  
(2. Ro. Abr. 146.  
Cro. Eliz. 920.  
2. Inst. 483. Cro.  
Cha. 179. Cro. Jam.  
404. 460. 1. Ro. Abr.  
729. Plowd. 364.)  
[e] 8 E. 4. 4.  
9 H. 6. 5.  
17 E. 3. 9.  
20. Ass. 25.  
2 Maria Dyer 104,  
106.  
(5 Co. 20. b. 27. a.  
& Co. 2. Cro. Cha.  
324. 500. 502.  
Mo. 106.  
Cro. Jam. 330.  
1. Stl. 41. 209. 444.)

"*Baylife ou receiver al aucun home, &c.*" By this &c. many things are implied, as by that baylife is understood a servant that hath administration and charge of lands goods and chattels to make the best benefit for the owner against whom an action of account doth lie for the profits which he hath raised or made or might by his

Fleta lib. 2. ca. 64.  
& ca. 67.  
Britton fol. 63. 70.  
Fleta lib. 2.  
cap. 64.  
41 E. 3. 30.  
46 E. 3.  
account 60.

(2) [See Note 33.]

(3) See acc. ant. 89. a. and note 1. there:

(4) Acc. post. 264. b.

(5) See F. N. B. 168. d. and the notes b. &c. in the 4to. edition as to infant's binding himself to serve.

2 R. 2. ibid. 45.  
 3 R. 2. ibid.  
 3 E. 3. 10.  
 (Cro. Jam. 127.  
 1 Leon. 219.)  
 [f] 13 E. 3.  
 Statut 9. 17 E. 2.  
 account 131.  
 31 E. 3. 8.  
 30 H. 4. 14.  
 3 H. 4. 13. regist.  
 155. (Finch L. 302.  
 303. Noy. 12.)  
 [g] 49 E. 3. 31.  
 40 E. 3. 3. b.  
 4 H. 6. 27.  
 (1. Ro. Abr. 119.  
 2. Inst. 379. 4. Leon.  
 39. 1. Ro. Rep. 87.)

[h] 30. E. 3. 2.  
 account 127.  
 47 E. 3. 32.  
 30 H. 7. 16.  
 Pract. li. 5. 66. 334.  
 Brit. 5. 62. Fleta 1.  
 2. ca. 64. R. 51.  
 6 E. 3. 1. lib. in-  
 trat. 17. 18. 19.  
 (F. N. B. 117. d.  
 Post. 182. a.  
 Cro. Jam. 416.)

[i] 45 E. 3. 16.  
 3 E. 3. 27.  
 30 E. 3. 27.  
 47 E. 3. 32.  
 F. N. B. 118.  
 (Post. 186. 300. b.)

[k] 13 E. 3.  
 account 70. 41 E. 3.  
 ibidem 34.  
 3 E. 3. 46.  
 3 E. 4. 6. b.  
 F. N. B. 119. c.  
 (2. Inst. 379.  
 F. N. B. 119. c.  
 1. Ro. Abr. 119.)  
 [l] 2 Mar. B.  
 account 89.  
 F. N. B. 117.  
 F. N. Com. 543.  
 3 H. 4. 12.  
 33 H. 6. 2.  
 4 H. 7. 6. &c.  
 (F. N. B. 119. c.)  
 [m] Statut lib. 5.  
 26. 340. b.  
 [n] 13 E. 3.  
 Lay 50.  
 [o] 36 E. 3. 63.  
 2 Marie Dyer  
 204. 105.

his industry or care have reasonably raised or made, his reasonable charges and expences deducted. [f] But one under the age of twenty one yeares shall not be charged in any such account; (6) because, by intendment of law, before his full age hee hath not skill and ability to raise or make any such improvement and profit.

An account against a receiver is, when one receiveth money to the use of another to render an account; but upon his account he shall not be allowed his expences and charges. [g] And therefore a man cannot charge a baylife as a receiver; because then the baylife should lose his expences and charges.

In an account against a receiver, the plaintife must declare by whose hands the defendant received the money, which he shall not doe in the case of a baylife. [h] But in some case in an action of account against one as *receptor denariorum*, he shall have allowance of his expences and charges, and also shall account for the profit he received (7) or might reasonably receive; and this was provided by law in favour of merchants, and for advancement of trade and trafficke.

As if two joynt merchants occupy their stocke goods and merchandizes in common to their common profit, one of them naming himselfe a merchant shall have an account against the other naming him a merchant, and shall charge him as *receptor denariorum ipsius B. ex quacunque causa & contractu ad communem utilitatem ipsorum A. & B. provenien' sicut per legem mercatoriam rationabiliter monstrare poterit.*

[i] If there be two joyntenants or tenants in common of lands, and the one make the other his baylife of his moiety, he shall have an action of account against him as bailife: and so are the bookes to be intended, that speake of an action of account in that case. (8)

So as there be but three kinds of writs of account, viz. against one as gardian, whereof *Littleton* hath spoken before in the Chapter of Socage; the second against one as baylife; and the third as receiver; as here it appeareth. [k] For a man shall not bee charged in an account as surveyor, controller, apprentice, reve, or heyward. And to maintaine an action of account, there must be, either a privity (9) in deed by the consent of the partie, for [l] against a disseisor or other wrongdoer no account doth lie; or a privity in law *ex provisione legis* made by the law, as against a gardian, &c. whereof sufficient hath been spoken in the Chapter of Socage. (10)

"*Ne terra jure en un enquest, &c.*" By this &c. is implied a maxime in law, [m] *quod minor jurare non potest.* [172. b.] For example [n] an infant cannot make his law of *non summons*; [o] and therefore the default shall not grieve him; for seeing the meane to excuse the default is taken away by law, the default it selfe

(6) See acc. ant. 88. b.

(7) See Dy. 21. b.

(8) [See Note 34.]

(9) See as to this and the king's prerogative

in charging persons as accountants the earl of Devonshire's case 11. Co. 89. a.

(10) Ant. 90. b.



selfe shall not prejudice him. But yet this rule hath an exception, that [h] an infant, when he is of the age of 12 yeares, shall take the oath of allegiance to the king (1): and this was, as *Bracton* saith, *secundum leges sancti Edwardi*; but indeed such was the law in the time of king *Arthur*. (2) [g] An infant cannot upon his oath make his law in an action of debt. [r] And the husband and wife of full age, for the debt of the wife before the coverture, shall make their law.

[g] Vid. devant cap. de Homage et cap. de Fealty, Sect. 85. 91. Bract. li. 2. fo. 124. Britton fo. 73, 74, et fol. 19. Fleta lib. 1. cap. 37. [g] 11 H. 40. 1 H. 7. 25. 15 E. 4. 24. (Post. 205.) [r] 46 E. 3. 10. 9 E. 4. 24.

15 E. 4. 2. 21 H. 5. 23. (Post. 205. a. Cro. Eliz. 161.)

## Sect. 260.

**I**TEM, si terres ou tenements soyent dones a un home en le taile, quel ad tant des terres en fee simple, et ad issue deux files et derie, et ses deux files font partition enter eux, issint que la terre en fee simple est allot a la file puisne en allowance des terres et (3) tenements tailes allottes a la file eigne, si, apres tiel partition fait, lu puisne filc alienast sa terre en fee simple a un auter en fee, et ad issue firs ou file et derie, l'issue poit bien entrer en les tenements tailes et eux tener et occuper en purpartie ovesque son aunt. Et ceo est pur deux causes. Un est, pur ceo que l'issue ne poit aver aucun remede de la terre alien per sa mere, pur ceo que la terre fuit a luy en fee simple; et pur tant que il est un de les heires en taile, et n'ad my aucun recompence de ceo que a luy affiert de les tenement tailes, il est reuson, que el eit sa purpartie de les tenements tailes, et nosmement quant tiel partition ne fait aucun discontinuance (1) †.

Mes le contrary est tenus M. 10 H. 6. scil. que le heire ne poit enter sur le parcener que ad la terre taile, mes est mis a formedon.

H. 6. scil. that the heire may not enter upon the parcener who hath the intailed land, but is put to a *formedon*.

“LA

(1) [See Note 35.]

(2) See notes 3. and 4. of fol. 68. b.

(3) In L. and M. instead of terres & it is autres.

**A**LSO, if lands or tenements be given to a man in taile, who hath as much land in fee simple, and hath issue two daughters and die, and his two daughters make partition betweene them, so as the land in fee-simple is allotted to the younger daughter in allowance for the lands and tenements in taile allotted to the elder daughter, if, after such partition made, the yonger daughter alieneth her land in fee simple to another in fee, & hath issue a son or daughter and dies, the issue may enter into the lands in taile and hold and occupy them in purparty with her aunt. And this is for two causes. One is, for that the issue can have no remede for the land sold by the mother, because the land was to her in fee simple; and in as much as she is one of the heires in taile, & hath no recompence of that which belongeth to her of the lands in taile, it is reason that she hath her portion of the lands tailed, and namely when such partition doth not make any discontinuance.

But the contrary is holden M. 10

(1) † In L. and M. Roh. and the two Cambridge MSS. these words are added, *de la taile, si come sera dit en apres en le chapitre de discontinuance*. What follows in this Section is not in L. and M. Roh nor the MSS.

(4 Co. 121. b.)

(Ant. 51. a.)

**"*La terre en fee simple est allot a la file puise.*"** It is first to be observed upon this whole case, that the fee simple land is allotted to the youngest daughter, and the land entailed to the eldest. This partition *primâ facie* is good; (4) and hereto the partition differeth from the exchange, where in the exchange the estates must be equal.

But yet this partition by matter subsequent may become voidable (as *Littleton* here puts the case). The eldest coparcener hath by the partition and the matter subsequent barred herself of her right in the fee simple lands, insomuch as when the youngest sister alieneth the fee simple lands and dieth, and her issue entrencheth into halfe the lands entailed, yet shall not the eldest enter into halfe of the lands in fee simple upon the alienee: for by the alienation, the privitie of the state is destroyed.

(Post. 174. b.)

**"*Le puise file alien la terre en fee simple, &c.*"** The same law it is, if the youngest daughter had made a gift in tayle, for the reversion expectant upon an estate tayle is of no account in law (2), for that it may bee cut off by the tenant in tayle. Otherwise it is of an estate for life or yeares. If in this case the youngest daughter alien part of the land in fee simple, and dieth, so as a full recompence for the land entailed descends not to her issue, she may waive the taking of any profits thereof and enter into the land entailed; for the issue in taile shall never be barred without a full recompence, though there be a warranty (3) in deed or in law descended. If on the other side the eldest coparcener alien the land entayled and dyeth, her issue shall have a *formedon* alone (4) for the whole land entailed; for so long as the partition continueth in force (5), she is only enheritable to the whole land entailed.

**"*Et n'ad my aucun recompence.*"** This is intended, as it appeareth, of a full recompence.

See more of this in the Chapter of Discontinuance, Sectione.

**"*Tiel partition ne fait aucun discontinuance.*"** And the reason thereof is, for that it passeth not by livery of seisin, but the partition is in truth lesse then a grant, for that it maketh no degree, but each coparcener is in by descent from the common ancestor.

20 H. 6. 14.

**"*Mais le contrary est tenu, &c.*"** This is no part of *Littleton*, and is contrary to law, as appeareth by *Littleton* himselfe; and besides, the case intended is not truly vouched, for it is not in 10 H. 6. but in 20 H. 6. and yet there is but the opinion of *Newton*, obiter, by the way. *Vide F. tit. part 1.*

(4) [See Note 36.]

the authorities collected in 1. Vin. Abr. 141. pl. 2. to which add 2. Atk. 206. and post. 174. b.

[173. a.]

(3) [See Note 37.]

(2) For the effect of this doctrine about reversions on estates taile, and with what qualification it should be understood, see

(4) [See Note 38.]

(5) See post. 176. b. and Sect. 274.

## Sect. 261.

**U**N autre cause est, pur ceo que il serrra rette la folly del eigne soer, que el voit suffer ou agree a tiel partition, ou el puissoit aver si el voile la moitie de la terre en fee simple et son moitie des terres en le taile pur sa purparty, et issint estre sure sans damage.

**A**NOTHER reason is, for that it shall be accounted the folly of the eldest sister, that she would suffer or agree to such a partition, where she might if shee would have had the moiety of the land in fee simple and a moiety of lands entailed for her part, and so to be sure without losse.

**“U**N autre cause, &c.” This is another reason to prove, that by the partition the eldest daughter hath concluded her selfe, as is aforesaid.

**“Son moitie des terres en le taile.”** For if a writ of partition had beene brought, the eldest should not have been compelled to take the whole estate in tayle, for the prejudice that might after ensue, but might have challenged the one moiety of the lands in taile, and another moiety of the lands in fee simple, and this she might doe *ex provisione legis*. But when she will not submit her to the policie and provision of the law, but betake herselfe to her owne policy and provision, there the law will not ayde her, as here by *Littleton* it manifestly appeareth. And so it is in the other case. (\*) As if a man be seised of three mannors of equal value in fee, and taketh wife, and chargeth one of the mannors with a rent charge, and dyeth, she may by the provision of the law take a third part of all the mannors and hold them discharged; but if she will accept the entire manor charged, it is holden that she shall hold it charged.

(\*) 20 E. 3.  
dower 133.  
17 E. 3. tit.  
dower 164.  
18 H. 6. 27.  
(Ant. 32. b.  
33. a.  
Dyer 1. Mar. 98.

[173. b.] A partition of lands intailed betweene parceners, if it be equall at the time of the partition, shall bind the issues in taile for ever (1), albeit the one doe alien her part.

But here it may be demanded, that seeing *Littleton* saith, that it shall be taken to be the folly of the eldest parcener, &c. what if so be the eldest did not know of the estate tayle either in respect of the antiquity thereof, or for want of having of the evidence, or for any other cause, what folly can be imputed to her?

The answer is, that it is presumed in law, that every one is conscious of her right and title to her owne land; and on the other side it should be arrected (2) great folly in her to bee ignorant of her owne title. And therefore the reason of *Littleton* doth firmly hold.

(1) Acc. ant. 166. a. 2. Vern. 233. (2) [See Note 39.]

## Sect. 262.

**A**UXY, si home soit seisie en fee d'un carve de terre per just title, et disseisist un enfant deins age d'un auter carve, et ad issue deux filles, et morust seisi d'ambideux carves, l'enfant adonque esteant deins age, et les filles entront et font partition, issint que l'un carve est allotte al purparty l'un, come per case al puisne en allowance d'auter carve que est allotte a le purparty de l'auter, si puis l'enfant enter en le carve dont il fuit disseisist sur la possession le parcener que ad mesme le carve, donques mesme le parcener poit entrer en l'auter carve que sa soer ad, et tencer en parcenary ovesque luy. Mes si le puisne aliena mesme la carve a un auter en fee simple devant l'entrie l'enfant, et puis l'enfant enter sur le possession l'aliennee, donque el ne poit enter en l'auter carve; pur ceo que per son alienation el ad luy tout ousterment dismissee d'aver ascun part de les tenements come parcener. Mes si le puisne devant l'entrie l'enfant fait de ceo un leuse pur terme d'ans, ou pur terme de vie, ou en fee tayle savant la reversion a luy, et puis l'enfant enter, la peraventure auterment est; pur ceo que el ne soy dismissee de tout ceo que fuit en luy, mes ad reserve a luy le reversion et le fee, &c.

there peradventure otherwise it is; because she hath not dismissed her selfe of all which was in her, but hath reserved to her the reversion and the fee, &c.

**A**LSO, if a man bee seised in fee of a carve of land by just title, and hee disseise an infant within age of another carve, and hath issue two daughters, and dyeth seised of both carves, the infant being then within age, and the daughters enter and make partition, so as the one carve is allotted for the part of the one, as per case to the youngest in allowance of the other carve which is allotted to the purpartie of the other, if afterward the infant enter into the carve whereof hee was disseised upon the possession of the parcener which hath the same carve, then the same parcener may enter into the other carve which her sister hath, and hold in parcenary with her. But if the yongest alien the same carve to another in fee before the entry of the infant, and after the infant enter upon the possession of the aliennee, then she cannot enter into the other carve; because by her alienation shee hath altogether dismissed her self to have any parte of the tenements as parcener. But if the youngest before the entry of the infant make a lease of this for terme of yeares, or for terme of life, or in fee tayle saving the reversion to her, and after the infant enter,

**B**EFORE (3) it appeareth that when the privy of the estate is destroyed by the feoffment of one coparcener, that upon eviction of a moiety by force of an entayle against the other she shall not enter upon the alienee. But in this case that *Littleton* here putteth, when the privy of the state remaineth, and the part of the one is evicted, (\*) she shall enter and hold in copartenary with her other coparcener; and so it is in the case of an exchange. By reason of the *Uc.* in the end of this Section there may two questions be justly demanded.

What if the whole estate in part of the purparty of one parcener be evicted by a title paramount; whether is the whole partition  
avoided.

(\*) 15 E. 4. 3. a.  
per Littleton.  
lib. 4. fo. 131.  
125. Bastard's  
case.

avoyded, for that *Littleton* here putteth the case that the whole purparty of the one is defeated?

The second question is, whether if but part of the state of one coparcener be evicted, as an estate in taile, or for life, leaving a reversion in the coparcener, whether that shall avoid the partition in the whole?

To the first it is answered, that if the whole estate in part of the purparty bee evicted, that shall avoyd the partition in the whole, bee it of a mannor, that is entire, or of acres of ground, or the like, that bee severall; [*n*] for the partition in that case implyeth for this purpose both a warrantie and a condition in law (4), and either of them is entire, and giveth an entry in this case into the whole.

[174. a.] And so hath it beene lately resolved [*o*] both in the case of exchange and of the partition.

To the second, if any estate of freehold be evicted firm the coparcener in all or part of her purparty, it shall be avoyded in the whole. (1) As if *A.* bee seised in fee of one acre of land in possession, and of the reversion of another expectant upon an estate for life, and hee disseise the lessee for life who makes continuall clayme; *A.* dyeth seised of both acres, and hath issue two daughters; partition is made, so as the one acre is allotted to the one, and the other acre to the other; the lessees enter; the partition is avoided for the whole, and so likewise hath [*p*] it beene lately resolved.

[*q*] Yet there is a diversity betweene the warranty, and the condition which the law createth upon the partition. Where one coparcener taketh benefit of the condition in law, (2) she defeateth the partition in the whole. But when shee voucheth by force of the warranty in law for part, the partition shall not bee defeated in the whole, but shee shall recover recompence for that part. And therein also there is another diversity betweene a recovery in value by force of the warranty upon the exchange and upon the partition. For upon the exchange he shall recover a full recompence for all that he loseth. But upon the partition she shall recover but the moiety, or halfe of that which is lost, to the end that the losse may be equall. (3)

Many other diversities there be between exchanges and partitions; for there are more and greater privities in case of partitions in persons blood and estates, than there is in exchanges; all which were too tedious to rehearse in this place, seeing so much as hath beene said herein is sufficient for the explanation of the cases of partition which *Littleton* hath put.

"*Donques el ne poct enter en l'auter carue, &c.*" By this is also approved that which hath beene often said before, that when the whole privy betweene coparceners is destroyed, there ceaseth any recompence to be expected either upon the condition in law or warranty in law by force of the partition.

"*Per*

(4) That is, a condition to give re-entry and a warranty to vouch and have recompence. See post. 384. a.

[174. a.]

(1) [See Note 40.]

(2) That is, by entry.

(3) See acc. the case of dower post. 384 b. See also the provision in favour of the lord for the third part not devisable by the statute of wills 34 and 35 H. 8. c. 5. f. 11.

[*n*] 13 E. 4; 3; 43 Ass. 22.

[*o*] Bastard's case lib. 4. fol. 121.

[*p*] Bastard's case, ubi supra. [*q*] Vide 3 F. 3. tit. Voucher 249.

(5. Co. 12. b. 1 Ro. Abr. 815. 4 Co. 122.)

18 E. 2. tit. Aid 171. 19 H. 6. 26. (Ant. 50. b.)

(Post. 343. b.)

[r] 41 E. 3. 24.  
31 H. 4. 23, 23.  
14 E. 8. Aid 34.  
(Hob. 21. 26.)

"*Per son alienation el ad luy tout ousterment dismiſſe d'aver aucun part de les tenements come parcener.*" Hereupon it followeth, that if one parcener maketh a feoffment in fee, and after her feoffee is impleaded and voucheth the feoffor, [r] she may have aid of her coparcener to deraigne a warranty paramount, (4) but never to recover *pro ratâ* against her by force of the warranty in law upon the partition; for *Littleton* here saith, that by her alienation she hath dismissed her selfe to have any part of the land as parcener, and without question as parcener she must recover *pro ratâ*, upon the warranty in law, against the other parcener.

[c] 43 E. 3. 23.  
Pl. Com.  
4 E. 3. 15.  
5 E. 3. 7.  
38 E. 3. 17, &c.  
[b] 32 E. 1. tit.  
Aid 178.  
3 E. 3. ibid. 163.  
(Post. 384. b.)

And yet in some case the feoffee of one coparcener shall have aid of the other parceners to deraigne the warranty paramount. And therefore [a] if there be two coparceners, and they make partition, and the one of them enfeoffes her sonne and heire apparent and dieth, the sonne is impleaded, albeit he be in by the feoffment of his mother, yet shall he pray in ayd of the other coparcener to have the warranty paramount; and the rea- [174. b.] son [b] of the granting of this aid is, for that the warranty betweene the mother and the sonne is by law annulled, (1) and therefore the law giveth the sonne albeit he be in by feoffment, to pray in ayd of the other parcener, to deraigne the warranty paramount; wherein is to be observed the great equity of the common law in this case;

*Ipsæ etenim leges cupiunt ut jure regantur.*

[\*] 2 H. 6. 16.  
(Plowd. Mansel's case.)

[\*] But if a man be seised of lands in fee, and hath issue two daughters, and make a gift in taile to one of them, and dye seised of the reversion in fee which descends to both sisters, and the donee or her issue is impleaded, she shall not pray in ayd of the other coparcener, either to recover *pro ratâ*, or to deraigne the warranty paramount; for that the other sister is a stranger to the state taile, whereof the eldest was sole tenant, and never partition was or could be thereof made. (2)

(Ant. 173. a.)

"*Mes si le puisne devant l'entree l'enfant fait de ceo un lease, &c. ou en fee taile savant le reversion a luy, &c.*" This (upon that which hath beene said) (3) needeth no explanation. Only this is to be observed, that, albeit it is in the power of tenant in taile to cut off the reversion, yet if the infant enter before it be cut off, the law hath such consideration of this reversion, that she that loseth it shall enter into her sister's part, and hold with her in coparcenary, for that the privity betweene them was not wholly destroyed. (4)

(4) See 31 H. 8. c. 1. s. 3. 4 H. 7. 3. a. and Plowd. Mansel's case 7. a. & b.

(2) See post. 177. b. *contra* as to land given in frankmarriage. See also 2 H. 6. 16.

[174. b.]

(1) Acc. post. 390. a.

(3) Ant. 173. a. and note 2. there.

(4) See ant. 193. a. & b.

## Sect. 263.

(F. N. B. 162. c.)

**I**TEM, si soient trois ou quater parceners, &c. que font partition enter eux, si le part d'un parcener soit defeat per tiel loyal entrie, el poit enter et occupier les auters terres ovesque tous les auters parceners, et eux compeller de faire novel partition de les auters terres enter eux, &c.

**A**LSO, if there be three or foure coparceners, &c. which make partition betweene them, if the part of the one parcener be defeated by such lawfull entrie, she may enter and occupie the other lands with all the other parceners, and compell them to make new partition betweene them of the other lands, &c.

**I**NTER eux, &c." This &c. implieth, that so it is betweene the surviving parceners and the heires of the other, or betweene the heires of parceners, all being dead.

## Sect. 264.

**I**TEM, si sont deux parceners, et l'un prent baron, et le baron et sa feme ont issue enter eux, et la feme deoy, et le baron soy tient eyns en le moily come tenant per le curtesie, en ceo cas le parcener que survesquist et le tenant per le curtesie bien poient faire partition enter eux, &c. Et si le tenant per le curtesie ne voit agreer al partition d'estre fait, donques le parcener que survesquest poit aver envers le tenant per le curtesie briefe de partitione faciend, &c. et luy compeller de faire partition. Mes si le tenant per le curtesie voile aver partition enter eux d'estre fait, et le parcener que survesquist ne voit ceo aver, donque le tenant per le curtesie n'avera aucun remedy pur aver partition, &c. Car il ne poit aver briefe de partitione faciend, pur ceo que il n'est parcener. Car tiel briefe gist pur parceners tantsolement. Et issint poyes veyer, que briefe de partitione faciend gist envers tenant per le curtesie, et uncore il mesne ne poit aver tiel briefe.

tenant by the curtesie, and yet he himselfe cannot have the like writ.

**A**LSO, if there bee two parceners and the one taketh husband, and the husband and wife have issue betweene them, and his wife dieth, and the husband keepes himselfe in as tenant by the curtesie, in this case the parcener which surviveth, and the tenant by the curtesie may well make partition between them, &c. And if the tenant by the curtesie will not agree to make partition, then the parcener which surviveth may have against the tenant by the curtesie a writ de partitione faciend, &c. and compel him to make partition. But if the tenant by the curtesie would have partition to be made between them, and the parcener which surviveth will not have this, then the tenant by the curtesie cannot have any remedy to have partition, &c. For hee cannot have a writ of partitione faciend, because he is no parcener. For such a writ lyeth for parceners only. And so you may see, that a writ of partitione faciend lyeth against

[5] 24 E. 3. 22.  
31 E. 3.  
Brieffe 339.  
9 E. 4. 13.  
19 H. 6. 20.  
3 H. 8. 20.  
3 H. 8. Am. 1.  
37 H. 6. 8.  
31 E. 3. 14.  
(Ann. 167. b.)

[c] 8 E. 3. 67.  
9 E. 3. 13.  
30 E. 3.  
Ald 120.  
19 E. 3. Ibid. 144.  
22 E. 3. 4.

"**L**E baron soy tient eins come tenant per le curtesie." This is no severance of the state in coparcenary, [b] for the other coparcener and the tenant by the curtesie shall be joyntly impleaded; for he doth continue the state of coparcenary, as the other parcener did. (5)

"Vers le tenant per le curtesie brieffe de partitione faciendâ, &c." Here by the &c. is implied, that albeit that [175. a.] the tenant by the curtesie be an estranger in blood, yet the [c] writ de partitione faciendâ clearly lies against the tenant by the curtesie, because he continueth the estate of coparcenary.

If two coparceners be, and one doth alien in fee, they are tenants in common, and severall writs of *fraciſe* must be brought against them; (1) and yet the parcener shall have a writ of partition against the alienee at the common law, which is a far stronger case then the case put of tenant by the curtesie.

"Tiel brieffe gist pur parceners tantselement." Hereby it appeareth, that neither the tenant by the curtesie, nor (much lesse) the alienee of a coparcener shall have a writ of *partitione faciendâ* at the common law; (2) for *Littleton* saith here, that such a writ lyeth onely for parceners, [\*] but it may be brought by a parcener against strangers, as it appeareth before. But a *nuper obiit* and a *rationabili parte* (3) doe lye onely betweene two coparceners on both sides.

[\*] 5 E. 3. 47, 48.  
[F. N. B. 197.  
Brieffe 306. b.)

Dist. 1. Modus 60.

F. N. B. 2.  
Regist.

If three coparceners be, and the eldest doth purchase the part of the youngest, the eldest, having one part by descent and the other by purchase, shall have a writ of partition at the common law against the other middle sister, *et sic de similibus*. And so it is in a far stronger case, if there be three coparceners, and the eldest taketh husband, and the husband purchase the part of the youngest, the husband for his part is a stranger and no parcener, and yet he and his wife shall have a writ of partition against the middle sister at the common law, because he is seised of one part in the right of his wife who is a parcener. (4)

"Pur aver partition, &c." Here by this &c. is included all others that be strangers in blood, whether they come to their estates by purchase or by act in law. Since *Littleton* wrote, by the statutes [d] one joyntenant or tenant in common may have a writ of partition against the other: and therefore at this day the alienee of one parcener may have a writ of partition against the other parcener, because they are tenants in common: and the like had been attempted in former parliaments [\*], but prevailed not untill these latter statutes.

[d] 31 H. 6.  
cap. 1. 32 H. 6.  
cap. 32. Vid.  
Sect. 200.

[\*] Rot. Parl.  
1 E. 3. nu. 22.

[e] Brooke tit.  
partition 41.

[e] The tenant by the curtesie shall have a writ of partition upon the statute of 32 H. 8. ca. 32. for albeit he is neither jointenant nor tenant in common, for that a *fraciſe* lyeth [175. b.] against

(5) Acc. post. 175. b. See also fo. 192. a. and Bro. Joinder in action 40.

Post. 192. a.

(2) See acc. Dy. 98. b.

(3) See ant. 164. b.

(4) See in F. N. B. 62. S. the form of the writ in such a case.

[175. a.]

(1) Acc. ant. 176. b. But it is no severance, if the alienation be only for life.



against the parcener and tenant by the curtesie, as hath been said, yet he is in equall mischief as another tenant for life.

[f] If there be three coparceners and a stranger purchase the part of one of them, he and one other of the coparceners shall not joyne in a writ of partition, neither by the common law, nor by force of the statute; for the words of the preamble of the statute be *(and none of them by the law doth or may know their severall parts, &c. and cannot by the laws of this realme make partition thereof, without other of their mutuall assents, &c.)* Now in this case the one of the plaintifes, viz. the parcener, may have a writ of partition at the common law, and the other parcener being a purchaser may have it by the statute; and therefore they shall not joyne in one writ.

[f] Mich. 7 Et  
8 Eliz. Bendloose  
inter Wotton &  
Cooke (1) Dier 3  
Marle 128. A. and  
7 Eliz. 243.

(1) S. C. is also in Dy. 260. b.

## CHAP. 2.

## Parceners by Custome.

## Sect. 265.

**P**ARCENERS *per le custome* sont, lou home seisie en fee simple, ou en fee taile, de terres ou tenements que sont de tenure appel gavelkind deins le county de Kent, et ad issue divers fils et devie, tielx terres ou tenements descenderont a louts les fils per le custome, et ovelment enherileront et ferront partition enter eux per le custome, sicome females ferront, et brieve de partitione facienda gist en ceo cas, sicome enter females. Mes il covient en la declaration de faire mention de le custome. Auxy tiel custome est en auters lieux d'Angleterre. Et auxy tiel custome est en North Gales, &c. (2)

**P**ARCENERS by the custome are, where a man seised in fee simple, or in fee taile, of lands or tenements which are of the tenure called gavelkind within the countie of Kent, and hath issue divers sonnes and die, such lands or tenements shall descend to all the sons by the custome, and they shall equally inherit and make partition by the custome, as females shall do, and a writ of partition lieth in this case as between females. But it behooveth in the declaration to make mention of the custome. Also such custome is in other places of England, and also such custome is in North Wales, (3) &c.

(L. Sid. 136.  
Ant. 140. a.)  
See before all the  
ancient authors of  
the law concern-  
ing gavelkind ubi  
supra. Lambert  
verbo. Terra ex-  
script.  
[g] s. E. 4. s. b.  
21 E. 4. s. b.  
Flo. Com. 120. b.  
in Buckle case.  
Vide sect. 8.  
versus finem.  
(1 Sid. 138.  
Doct. Plac. 105.)  
(h) Berrocheshire.  
Hereford.

“**M**ES il covient en la declaration de faire mention de la *custome*.” Well said *Littleton*, [g] that he in his declaration must make mention of the custome, as to say, that the land is of the custome of *gavelkinde*; but hee shall not prescribe in it. And so is it of *Burgh English*. And these two vary in that point from other customes; for the law, when they are generally alledged, taketh knowledge of these two. (4)

In [h] *Domesday* it is thus said, *duo fratres tenuerunt in paragio* (5) *quisque habuit aulam suam, et potuerint ire quod voluerint*.

“*Auxy tiel custome est en auters lieux Angleterre*.” Of this sufficient hath beene said before. (6)

(i) Lamb. verb.  
Welshmen. Sil-  
vester Giraldus.

“*North Gales*,” Wales, *Wallia*. It commeth [i] of the Saxon word *wealth*, which signifieth *peregrinus*, or *exterus*; for the *Saxons* so called them, because in troth they were strangers to them, being the remaine of the old and ancient Britons, a wise and warlike nation inhabiting in the west part of England. These men have kept their proper language for above these thousand yeares past; and they to this day call us Englishmen *Saisons* (that is) Saxons. And the like custome, as our author here saith, was in North Wales, was also in Ireland; for there the lands also (which is one marke of the ancient Brittons) were of the nature of *gavelkinde*: but where by their

(2) In L. and M. and the two MSS. it is  
*en Northumberland et North Walce, &c.*

(3) [See Note 41.]

(4) [See Note 42.]

(5) [See Note 43.]

(6) Ant. 14. a. and 140. a. See also book  
1. chap. 7. of Robinson on Gavelkind, where  
the reader will see a most learned disserta-  
tion on the origin, antiquity and universality  
of partible descents.

[176. a.] their *Brehon* law the bastards inherited with their legitimate sons, as to the bastards that custome was abolished. (1) And agreeing with *Littleton* in this point, see an old statute.\* *Aliter usitatum est in Walliâ quàm in Angliâ, quoad successionem hereditatis, eò quòd hereditas partibilis est inter hæredes masculos, et à tempore cujus non extitit memoria partibilis extitit, dominus rex non vult, quòd consuetud. illa abrogetur, sed quòd hereditates remaneant partibiles inter consimiles hæredes sicut fieri consuevit, et fiat partitio illius sicut fieri consuevit.* (2)

Vide Sect. 212.

\* Stat. Wallia, an. 12 E. 1.

"*Parceners per le custome, &c.*" Well sayd *Littleton*, "by the custome," for sons are parceners in respect of the custome of the fee or inheritance, and not in respect of their persons, as daughters and sisters, &c. be. [h] *Et sunt participes quasi partem capientes, &c. ratione ipsius rei quæ partibilis est, et non ratione personarum, quæ non sunt quasi unus hæres et unum corpus, sed diversi hæredes, ubi tenementum partibile est inter plures cohæredes petentes, qui descendunt de eodem stirpe et semper solent dividi ab antiquo.*

[A] Bract. li. 5. fo. 438. Brit. cap. 71. Flet. lib. 5. cap. 9.

## Sect. 266.

**I**TEM, il y ad autre particion quel est d'autre nature et d'autre forme que ascuns des partitions avaut dits sont. Sicome home seisie de certain terres en fee simple ad issue deux files, et l'eigne est mary, et le piere dona parcel de ses terres a le baron ove sa file en frankmariage, et morust seisie de le remnant, le quel remnant est de plus greinder value per an que sont les terres dones en frankmariage.

**A**LSO, there is another partition which is of another nature and of another forme then any of the partitions aforesaid be. As if a man seised of certaine lands in fee simple hath issue two daughters, and the eldest is married, and the father giveth part of his lands to the husband with his daughter in frankmariage, and dyeth seised of the remnant, the which remnant is of a greater yearly value than the lands given in frankmariage.

"**D**ONA parcel de ses terres a le baron ove sa file en frankmariage."

Here it appeareth, that a gift in frankmarriage may be made after marriage, as hath beene sayd in the chapter of Fee Tayle. (3)

"*Le quel remnant est de plus greinder value per an, &c.*" Admit that the lands given in frankmariage are of greater value than the lands descended in fee simple, shall the other sister have any remedy against the donees? It is plaine she shall not; because it is lawfull for a man to dispose of his own lands at his will and pleasure.

(1) [See Note 44.]

(2) See ant. 175. b. note 4.

(3) See ant. 21. b. See also acc. as to

dower *ex assensu patris* after marriage F. N. B. 151. L.

## Sect. 267.

**E**N cel case, le baron, ne le feme, avera riens pur lour purpartie de le dit remnant, sinon que ils voient mitter lour terres dones en frankmariage en hotchpot ovesque le remnant de la terre ovesque sa soer. Et si issint ils ne voient fayre, donques le puisne poet tener et occupier meme le remnande, et prendra a luy les profits tantsolement. Et il semble, que cest parol (hotchpot) est en English a pudding; car en tiel pudding n'est communement mise un chose tantsolement, mes un chose ovesque autres choses ensemble. Et pur ceo il covient en tiel case de mitter les terres dones en frankmariage ovesque les auters terres en hotchpot, si le baron et sa feme voient aver aucun part en les auters terres.

**I**N this case, neither the husband, nor wife, shall have any thing for their purpartie of the said remnant, unless they will put their lands given in frankmariage in *hotchpot*, with the remnant of the land with her sister. And if they will not doe so, then the youngest may hold and occupie the same remnant, and take the profits onely to her selfe. And it seemeth, that this word (*hotchpot*) is in English a pudding; for in this pudding is not commonly put one thing alone, but one thing with other things together. And therefore it behooveth in this case to put the lands given in frankmariage with the other lands in *hotchpot*, if the husband and wife will have any part in the other lands.

(1) 8 H. 3.  
breve 880. 34 E. 1.  
nuper obtit 15. ad-  
judge 4 E. 3. 49.  
10. Ass. p. 14.  
VI. 10 E. 3.  
38. & 30. Ass. 7.  
Bretton lib. 2.  
fol. 77. lib. 5.  
fol. 438. Brit.  
ca. 73. Fleta  
lib. 6. cap. 47.

“**E**N cel case, le baron, ne le feme, avera riens pur lour purpartie, &c.” [f] This gift in frankmariage shall *prima facie* be intended a sufficient advancement; and therefore the remnant shall descend to the other coparcener, onely with this provision in law *tacite* annexed, that if the donees will put the land into *hotchpot*, then she shall out of the remnant make up [176. b.] her part equall. But the donees must doe the first act, and in the meane time the whole fee simple land descends to the other. And this is warranted here by *Littleton*, viz. that the donees shall have nothing for the purpartie of the remnant, unless they will put their lands given in frankmariage in *hotchpot* so as the donees must doe the first act; and more expresly after in this Chapter, (1) where he directly saith, that the other sister shall enter into the remnant, and them to occupy to her owne use, unless the husband and wife will put the lands given in frankmariage into *hotchpot*. And herewith agreeth *Fleta*, (2) who saith, *cum dicat tenens excipiendo, quod non tenetur petenti respondere, quia A. participem habet, &c. replicari poterit a petente quod predict' A. tenet quandam partem in maritagium de communi hereditate, nec vult illud in partem ponere*. And here are three things (that I may speake once for all) to be observed. First, that in this speciall case where there be two daughters, one of them onely shall inherit the lands in fee simple. Secondly, that in this case there lieth no writ of partition: because *non tenent inanimul et pro indiviso*. Thirdly, if the parcener, to whom the land in fee simple descended, will not put the lands in *hotchpot*, then may the donees enter into the fee simple lands, and hold them in coparcenarie with her.

(1) See Sect. 268.

(2) See also acc. F. N. B. 197. O.

And it seemeth by our old bookes, [k] that by the ancient law there was a kind of resemblance hereof concerning goods. *Si autem post debita deducta, et post deductionem expensarum quæ necessarii erunt, id totum, quod tunc superfuerit, dividatur in tres partes; quarum una pars relinquatur pueris (3) si pueros habuerit defunctus, secunda uxori si superstes fuerit, et de tertiâ parte habeat testator liberam disponendi facultatem. Si autem liberos non habeat, tunc medietas defuncto, et alia medietas uxori: si autem sine uxore decesserit liberis existensibus, tunc medietas defuncto, et alia medietas liberis tribuatur: si autem sine uxore et liberis, tunc id totum defuncto remanebit.* And by the law before the Conquest it\* was thus provided, *sive quis incuria sive morte representandus fuerit intestatus mortuus, dominus tamen nullam rerum suarum partem (preter eam quæ jure debetur heredi nomine) sibi assumit, verum eas judicio suo uxori liberis et cognatione proximis justè pro suo cuique jure distribuit.*

But it appeareth by the Register [l] and many of our bookes, that there must be a custome alledged in some county, &c. (5) to inable the wife or children (5)† to the writ *de rationabili parte bonorum*; (6) and so hath it been resolved in parliament. [m] But such children, as be reasonably advanced by the father, in his life time with any part of his goods, shall have no further part of his goods; for the words of the writ be, *nec in vitâ patris promoti fuerant.* (7)

Note, the custom of London is, that if the father advance any of his children with any part of his goods, that shall bar them to demand any further part, unlesse the father under his hand or in his last will do expresse and declare, that it was but in part of advancement, (8) and then that child so partly advanced shall put his part in *hotchpot* with the executors and widow, (9) and have a full third part of the whole, accounting that which was formerly given unto him as part thereof. And this is that in effect, which the civilians call *collatio sanorum.* (10)

[177. a.] “*Et il semble que cest furot (hotchpot) est en Engleish searcheth for the signification of words, in all arts; a thing most necessary; for ignoratis terminis ignoratur et ars. Vide for Etymologies, Sect. 95. 119. 135. 154. 164. 204. 234, &c.*”

*Hotchpot* or *hospot* is an old Saxon word, and signifieth so much as *Littleton* here speaks. And the French use *hotchpot* for a communion of divers things together. It signifieth here metaphorically *in partem positio*. In English we use to say *hodgepodge*, in Latine *sarrago* or *miscellaneum*.

The residue of this Section needeth no explication.

(3) [See Note 45.]

(4) The chapter of Fleta is here referred to erroneously. It should be cap. 57.

(5) [See Note 46.]

(5)† [See Note 47.]

(6) [See Note 48.]

(7) [See Note 49.]

(8) [See Note 50.]

(9) [See Note 51.]

(10) [See Note 52.]

[177. a.]

(1) This reference to Fleta is wrong. It should be lib. 5. cap. 9. p. 324.

[k] Glanvil. lib. 7. cap. 5. Bracton lib. 2. fol. 60. Fleta. lib. 2. cap. 5. (4) Magna Carta cap. 16. 3. F.N.B. 232. 30 E. 3. 25. 31 E. 3. Resp. 60. 31. Ass. 14. 17 E. 2. Domesday 17 E. 3. 17. 1 E. 2. Domesday 60. 31 H. 3. tit. rationabil. Marten. honorem 6.

\* Lamb. 2. 110. 62. (Part. 182. b. Art. 149. b.)

[l] Regist. 142. 34 E. 1. Domesday 60. 1 E. 4. 6. 7 E. 4. 31. 43 E. 3. 25. (F.N.B. 122. L.) [m] 3 E. 3. Domesday 156. 40 E. 3. 18.

Vide Brit. cap. 72. 4 E. 3. 49. 6 E. 3. 30. 10 E. 3. 25. 24 E. 3. 27. F.N.B. 262. Regist. 322. Fleta lib. 6. ca. 47. (1) Mich. 10 E. 3. coram iudice Hospot. Cord in thesaur.

## Sect. 268.

**E**T cest terme (*hotchpot*) n'est fors-  
que un terme similitudinarié, et  
est a tant a dire, c'estascavoir, de mit-  
ter les terres en frankmarriage et les  
autres terres en fee simple ensemble;  
et ceo est a tiel entent de conuiter le  
value de toutes les terres, scil. de les  
terres dones en frankmarriage, et de  
le remnant que ne fueront dones, et  
donques partition serra fait en le  
forme que ensuist. Sicome, mittomus  
que home soit seisié de 30 acres de  
terre en fee simple, chescun acre de  
value de 12d. per an. et que il ad  
issue deux filles, et l'une est covert de  
baron, et le pier dona 10 acres de les  
30 acres a le baron ore sa fille en  
frankmarriage, et morust seisié de le  
remnant, donques l'auter soer entra  
en le remnant, scil. en les 20 acres,  
et eux occupiera a son use demesne,  
si non que le baron et sa feme voille  
mitter les 10 acres dones en franke-  
marriage ore les 20 acres en *hotchpot*,  
c'estascavoir, ensemble; et douque  
quant le value de chescun acre est  
conus, c'estascavoir, que chescun acre  
vaut per an, et est assesse ou enter  
eux agree, que chescun acre vult  
per an 12d. donques le partition  
serra fait en tiel forme, c'estascavoir,  
le baron et sa feme averont oustre les  
10 acres dones a eux en frankmar-  
riage 5 acres en severaltie de les 20  
acres, et l'auter soer avera le rem-  
nant, scil. 15 acres de les 20 acres  
pur sa purpartie, issint que ac-  
complant les 10 acres que le baron  
et sa feme ont per le done en  
frankmarriage, et les autres 5 acres  
de les 20 acres, le baron et sa feme  
ont autant en annual value que  
l'auter soer ad.

**A**ND this tearme (*hotchpot*) is  
but a tearme similitudinarié, and  
is as much to say, as to put the lands  
in frankmarriage and the other lands  
in fee simple together; and this is  
for this intent, to know the value  
of all the lands, scil. of the lands  
given in frankmarriage, and of the  
remnant which were not given, and  
then partition shall be made in form  
following. As, put the case that a  
man be seised of 30 acres of land in  
fee simple, every acre of the value  
of 12 pence by the yeare, and that  
he hath issue two daughters, and  
the one is covert baron, and the fa-  
ther gives ten acres of the 30 acres  
to the husband with his daughter  
in frankmarriage, and dyeth seised  
of the remnant, then the other sister  
shall enter into the remnant, viz.  
into the 20 acres, and shall occupie  
them to her owne use, unlesse the  
husband and his wife will put the  
10 acres given in frankmarriage with  
the 20 acres in *hotchpot*, that is to  
say, together; and then when the  
value of everie acre is knowne, to  
wit; what every acre valueth by the  
year, and it is assessed or agreed be-  
tween them, that every acre is worth  
by the yeare 12 pence, then the  
partition shall be made in [177. b.]  
this manner, viz. the hus-  
band and wife shall have besides  
the 10 acres given to them in frank-  
marriage 5 acres in severaltie of the  
20 acres, and the other sister shall  
have the remnant, scil. 15 acres of  
the 20 acres for her purpartie, so as  
accounting the 10 acres which the  
baron and fem have by the gift in  
frankmarriage, and the other 5 acres

of the 20 acres, the husband and wife have as  
much in yearly value as the other sister.

Bract. lib. 2.  
fol. 77. lib. 5.  
fol. 128. Brict.  
cap. 72. and  
Fleta lib. 6. ca. 47.  
4 E. 3. 49.  
70. 2. 367.

**A**ND herewith in expresse tearmes agreeth *Bracton*, *Britton*,  
*And* and *Fleta*, and all the bookes abovesaid and many others.  
And it is worthy the observation [n], that after this putting into

[177. b.] 10 E. 37. 18. Ass. 14. 4 E. 3. 40.

hotchpot

hotchpot, and partition made, the lands given in frankmarriage are become as the other lands which descended from the common ancestor, and of these lands if she be impleaded [o] she shall have aide of the other parcener as if the same lands had descended. (1) So the coparcener that hath a rent granted to her for owelty of partition, as is aforesaid, hath the rent, as if it had descended to her from the common ancestor.

[o] 20. Ass. 22.  
(Ant. 109. b.)

## Sect. 269.

(Hib. 10.) (Ant. 23. a.)

**E**T issint tous foits sur tiel partition les terres dones en frankmarriage demurgent a les donees et a leur heires solonque le forme de le done: car si l'auter parcener averoit riens de ceo que est done en frankmarriage, de ceo ensueroit enconvenience est chose enconunter reason, que la ley ne voit suffer. Et la cause, pur que les terres dones en frankmarriage serront mis en hotchpot, est ceo. Quant home done terres ou tenements en frankmarriage ove sa fille, ou ove auter cosin, il est entendus per la ley, que tiel done fait per tiel parol (frankmarriage) est un avancement, et pur avancement de sa fille, ou de son auter cosin, et nosmement quant le doner et ses heyres n'averont ascun rent ne service de eux, sinon que soit fealty, tanque le quart degre soit passe, &c. Et pur tiel cause la ley est, que el avera riens de les autres terres ou tenements descendus a l'auter parcener, &c. sinon que el voile mitter les terres dones en frankmarriage en hotchpot, come est dit. Et si el ne voile mitter les terres dones en frankmarriage en hotchpot, donque el n'avera riens del remnant, pur ceo que serra entendu per la ley, que el est suffisamment avance, a que avancement el soy agree et luy tient content.

(1) See ant. 174. b. contra as to gift in tail to a daughter not being in frankmarriage.

**A**ND so alwaies upon such partition the lands given in frankmarriage remaine to the donees and to their heires according to the forme of the gift: for if the other parcener should have any of that which is given in frankmarriage, of this would ensue an inconvenience and a thing against reason, which the law will not suffer. And the reason, why the lands given in frankmarriage shal bee put in hotchpot, is this. When a man giveth lands or tenements in frankmarriage with his daughter, or with his other cousin, it is intended by the law, that such gift made by this word (frankmarriage) is an advancement, and for advancement of his daughter, or of his cousin, and namely when the doner and his heires shall have no rent nor service of them, but fealty, untill the fourth degree be past (1). And for this cause the law is, that she shall have nothing of the other lands or tenements descended to the other parcener, &c. unlesse shee will put the lands given in frankmarriage in hotchpot, as is said. And if she will not put the lands given in frankmarriage in hotchpot, then she shall have nothing of the remnant, because it shall be intended by the law, that shee is sufficiently advanced, to which advancement shee agreeth and holds her selfe content.

[178. a.]

(1) See ant. 21. b.

**D**E ces'ensueroit enconvenience et chose encounter reason,  
que la ley ne voet suffer."

Regula.

[o] Vid. Sect. 139,  
150. 231. 440. 478.  
488. 722.

[p] 40. Ann. 27.  
(Ann. 23. b.)  
Sect. 20.

*Quod est inconueniens aut contra rationem non permissum est in lege.* Hereby it appeareth, as it hath beene often noted, [o] that an argument *ab inconuenienti aut ab eo quod est contra rationem* is forcible in law. [p] *Nihil enim quod est inconueniens, est licitum.*

"*Tanque le quart degre ait passe, &c.*" Here by *&c.* is implied how the degrees shall be accounted, whereof sufficient hath beene said before.

## Sect. 270.

**M**ESME la ley est perenter les  
heires de les donees en frank-  
marriage et les autres parceners, &c.  
si les donees en frankmarriage decient  
deuant leur auncester, ou deuant tiel  
partition, &c. quant a misser en  
hotchpot, &c.

**T**HE same law is between the  
heirs of the donees in frank-  
marriage, and the other parceners,  
&c. if the donees in frankmarriage  
die before their ancestor, or before  
such partition, &c. as to put in  
hotchpot, &c.

**B**Y these three *&c.* in this Section is implied, that if either the  
donees dye before the ancestor, or survive the ancestor and die  
before such a partition, or if the donees and all the parceners die  
before such partition upon the putting into hotchpot, their issues  
shall have the same benefit to put the lands into hotchpot; for that  
benefit is heritable, and descendible to the issues.

## Sect. 271.

**E**T nota, que donees en frank-  
marriage fueront per la common  
ley deuant le statute de Westminster  
second, et tout temps puis ad este use  
et continue, &c.

**A**ND note, that gifts in frank-  
marriage were by the common  
law before the statute of Westm.  
second, and have been alwaies since  
used and continued, &c.

"**C**ONTINUE, &c." By this *&c.* is to be understood, that  
before the statute it was a fee simple, and since the [178. b.]  
statute a fee taile. So as it is true, that [q] the gifts doe  
continue (as our author here saith) but not the estates; for the  
estate is changed, as at large appeareth in the Chapter of Estates in  
Taile. And albeit our author here saith, that such gifts have beene  
alwaies since used and continued, yet now they be almost growne  
out of use, and serve now principally for moote cases and questions  
in law that thereupon were wont to rise.

[q] 42 H. 4. 31.  
34. E. 3.  
Gard. 116.  
(Ann. 21. a.)



## Sect. 272.

**I**TEM, tiel mitter en hotchpot, &c. est, lou les autres terres ou tenements que ne fueront dones en frankmariage descendent de les donors en frankmariage tantsolement ; car si les terres descenderont a les files per le pier le donor, ou per le mere le donor, ou per le frere le donor ou autre ancestor, et nemy per le donor, &c. la autrement est ; car en tiel cas el, a quel tiel done en frankmariage est fait, avera sa part, sicome nul tiel done en frankmariage ust este fait, pur ceo que el ne fuit avance per eux, &c. cins per un autre, &c.

**A**LSO, such putting in hotchpot, &c. is, where the other lands or tenements which were not given in frankmariage descend from the donors in frankmariage only ; for if the lands shall descend to the daughters by the father of the donor, or by the mother of the donor, or by the brother of the donor or other ancestor, and not by the donor, &c. there it is otherwise ; for in such case shee, to whom such gift in frankmariage is made, shall have her part, as if no gift in frankmariage had beene made, because that she was not advanced by them, &c. but by another, &c.

**T**HE lands given in frankmariage and the lands in fee simple must move from one and the same ancestor, for the lands given in frankmariage are in respect of the advancement accounted in law, as hath beene said (1), as if the same had descended from the same ancestor who died seised of the fee simple lands, and there is no reason to barre the donee of her full part of the fee simple lands that descended from another ancestor from whom shee had no such advancement.

“ Nemy fier le donor, &c.” Here &c. implyeth no more but that donor that made the gift of frankmariage. The other two &c. in this Section need no explanation.

## Sect. 273.

**I**TEM, si home seisie de 30 acres de terre chescun acre de ovel annual value, eiant issue deux files come est avantdit, et dona 15 acres de [179. a.] eco a le baron ote sa file en frankmarriage, et morust seisie de les autres 15 acres, en cest case l'auter soer avera les 15 acres issint descendus a luy sole, et le baron et sa feme ne mitteront en tiel cas les 15 acres a eux dones en frankmarriage en hotchpot ; pur ceo que les tenements dones en frankmarriage sont de auxy grand et de bone annual

**A**LSO, if a man be seised of 30 acres of land everie acre of equall annual value, and have issue two daughters as aforesaid, and giveth 15 acres hereof to the husband with his daughter in frankmarriage, and dies seised of the other 15 acres, in this case the other sister shall have the 15 acres so descended to her alone, and the husband and wife shall not in this case put the 15 acres given to them in frankmariage into hotchpot ; because the tenements given in frankmariage are

1) Ant. 177.

nual value comes les autres terres descendus, &c. Car si les terres dones en frankmarriage sont de tant egal annual value que le remnant sont, ou de plus value, en vaine et a nul ententient tielx tenements dones en frankmarriage serront mis en hotchpot, &c. pur ceo que el ne poit riens aver de les autres terres descendus, &c. car si el averoit ascun parcel de les tenements descendus, donques el avera plus de annual value que sa soer, &c. que la ley ne voit, &c. Et sicome est parle en les cases avantdits de deux files ou de deux parceners; en mesme le maner est en semblable cas, lou sont plusors soers ou plusors parceners, solongue ceo que le case et le matier est, &c.

are of as great and good yearly value as the other lands descended, &c. For if the lands given in frankmarriage bee of equall or of more yearly value then the remnant, in vaine and to no purpose shall such tenements given in frankmarriage bee put in hotchpot, &c. for that she cannot have any of the other lands descended, &c. for if shee should have any parcell of the lands descended, then she shall have more in yearly value then her sister, &c. which the law will not, &c. And as it is spoken in the cases aforesaid of two daughters or of two parceners; in the same manner it is in the like case, where there are more sisters or more parceners, according as the case and matter is, &c.

**B**Y this Section and the &c. herein some have gathered, that the value of the lands shall be accounted as they were at the time of the gift in frankmarriage. But it is clear, that the value shall bee accounted as it was at the time of the partition; for if the donor purchase more land after the gift, or if the land given in frankmarriage be by the act of God decayed in value, or if the remnant of the lands in fee simple be improved after the gift, or *à converso*, the law shall adjudge of the value as it was at the time of the partition, (unlesse it bee by the proper act or default of the parties) as hath beene said before in the former Chapter. And some have collected upon this Section, that the reversion in fee of the lands given in frankmarriage shall only descend to the donee; for otherwise the other sister shall have more benefit then the donee, which should bee against the reason of our author.

(Ant. 22. a.  
371. a.)

Regul. Vid.  
Sect. 194. 579.  
lib. 5. fo. 89.

"*In vaine et a nul entent, &c.*" For it is a maxime in law, *lex non facit inu-tilia, quia inutilis labor stultus.*

(Ant. 172. b.)

Sect. 274.

[179. b.]

**E**T est ascavoir, que terres ou tenements dones en frankmarriage ne serra mise en hotchpot, jorsque ou terres descendront en fee simple; car de terre descendus en fee taile partition serra fait, sicome nul tiel done en frankmarriage ust este fait.

**A**ND it is to be understood, that lands or tenements given in frankmarriage shall not bee put in hotchpot, but where lands descend in fee simple; for of lands descended in fee taile partition shall be made, as if no such gift in frankmarriage had beene made.

FOR

21. Ass. pl. 14.

**F**OR of lands intailed the donee in frankmarriage shall have as much part as the other coparcener, because, over and besides the land given in frankmarriage, the issue in taile claimeth *per formam doni*, and both of the parceners must equally inherit by force of the gift, *et voluntas donatoris, &c. observetur.*

## Sect. 275.

**I**TEM, nuls terres serra mise en hotchpot ove auters, sinon terres que fueront done en frankmarriage tantsolement : car si ascun feme ad ascuns auters terres ou tenements per ascun auter done en le tayle, el ne unques mittera tiel terre issint done en hotchpot, mes el avera sa purpartie de le remnant descendus, &c. scilicet, a tant que l'auter parcener avera de le meisme remnant.

**A**LSO, no lands shall bee put in hotchpot with other lands, but lands given in frankmarriage only : for if a woman have any other lands or tenements by any other gift in taile, she shal never put such lands so given in hotchpot, but she shal have her purparty of the remnant descended, &c. (*videlicet*) as much as the other parcener shall have of the same remnant.

**F**OR if the ancestor infeoffeth one of his daughters of part of his land, or purchase lands to him and her, and their heires, or giveth to her part of his lands in taile speciall or generall, she notwithstanding this shall have a full part in the remnant of the lands in fee simple ; for the benefit of putting, &c. into *hotchpot* is onely appropriated to a gift in frankmarriage, (*quia maritagium cadit in partem*) which shall be (as is aforesaid) accounted as parcel of her advancement.

13 E. 2. c. 18.  
taile 36.  
6 E. 3. 30. b.  
4 H. 3. 40, 50.

Briet. B. 2. fo. 77.

## Sect. 276.

**I**TEM, un auter partition poet estre fait enter parceners, que varriast de les partitions avantdits. Si come y sont trois parceners, et le puisne voet aver partition, et les auters deux ne voillent, mes voilent tener en parcenarie ceo que a eux [180. a.] affiert sans partition, en ceste case, si un part soit alot en severalty al puisne soer, solongue ceo que el doit aver, donques l's auters poient tener le remnant en parcenarie, et occuper en common sans partition, si els voilent, et tiel partition est assets bone. Et si apres l'eigne ou le mulnes parcener voile fayre partition inter eux de ceo que l's teignent, ils poient ceo bien faire quant

**A**LSO, another partition may be made betweene parceners, which varieth from the partitions aforesaid. As if there bee three parceners, and the youngest will have partition, and the other two will not, but will hold in parcenarie that which to them belongeth, without partition, in this case, if one part be allotted in severalty to the youngest sister, according to that which shee ought to have, then the others may hold the remnant in parcenarie, and occupy in common without partition, if they will, and such partition is good enough. And if afterwards the eldest or middle parcener will make partition betweene them

*quant a eux pleist. Mes lou partition serra fait per force de brieve de partitione faciend., la autrement est ; car la covient, que chescun parcener avera sa part en severaltie, &c.*

*Plus serra dit des parceners en le Chapter de Joyntenants, et auxy en le Chapter de Tenants in Common.*

them of that which they hold, they may well do this when they please. But where partition shall be made by force of a writ of *partitione faciendā*, there it is otherwise ; for there it behoveth, that every parcener have her part in severaltie, &c.

More shall be said of parceners in the Chapter of Joyntenants, and also in the Chapter of Tenants in Common.

24 H. 3. de  
Partis. 19.

Regula.

**H**ERE it is to be observed, that this partition is good by consent, for *consensus tollit errorem* ; but if it be by the king's writ, then everie parcener must have his part. And here you may see that *modus et conventio vincunt legem*.

" *En severaltie, &c.*" Here by this &c. is implied another kind of severaltie than our author hath mentioned : and that is, that the one parcener shall have the land in severaltie from the feast of Easter untill the gyle of August, (that is, the first of August) and the other in severaltie from thence untill the feast of Easter, or the like, *et sic alternis vicibus* to them and their heires *in perpetuum*, whereof sufficient hath beene spoken before. (1)

(1) Ant. 4. a. and 167. a.

## CHAP. 3.

## Of Joyntenants.

## Sect. 277.

**J**OYNTENANTS sont, sicome home seisie de certaines terres ou tenements, &c. et enfeoffe deux, trois, quater, ou plusors, d aver et tener a eux pur terme de lour vies, ou pur terme d'auter vie, per force de quel feoffment ou lease ils sont seisies, tiels sont joyntenants.

**J**OYNTENANTS are, as if a man bee seised of certaine lands or tenements, &c. and infeoffeth two, three, foure, or more, to have and to hold to them for term of their lives, or for terme of another's life, by force of which feoffment or lease they are seised, these are joyntenants.

**T**HIS agreeth not with the original, (2) for it should bee, *joyntenants sont, sicome home seisie de certaine terres ou tenements &c. et ent enfeoffe deux, ou trois, ou quater, ou plusors, a aver et tener a eux et a lour heires, ou lessa a eux pur terme de lour vies, ou pur terme d'auter vie, per force de quel feoffment ou lease, &c.* The error may easily bee perceived by that which is in print, viz. "by force of which feoffment or lease," &c. ergo these [180. b.] must be feoffment and lease spoken of before.

There be also joyntenants by other conveyances than *Littleton* here mentioneth, as by fine, recoverie, bargain and sale, release, confirmation, &c. So there be divers other limitations than *Littleton* here speaketh of: as if a rent charge of ten pounds be granted to *A.* and *B.* to have and to hold to them two, viz. to *A.* untill he be married, and to *B.* untill he be advanced to a benefice, they be joyntenants in the meane time, notwithstanding the severall limitations; (1) and if *A.* die before marriage, the rent shall survive; but if *A.* had married, the rent should have ceased for a moitie, *et sic è converso* on the other side.

*Littleton* having spoken of one kinde of tenants *pro indiviso*, viz. of parceners, commeth now to another, viz. joyntenants: and first of joyntenants of freehold. If an alien and a subject purchase lands in fee, they are joyntenants, and the survivorship shall hold place, (2) *et nullum tempus occurrit regi*, upon an office found.

"Joyntenants." So called, because the lands or tenements, &c. are conveyed to them jointly, *conjunctim feoffati*, &c. or *qui conjunctim tenent*, and are distinguished from sole or severall tenants, from parceners, and from tenants in common, &c. and anciently they were called *participes, et non heredes*. And these joyntenants must jointly implead and jointly be impleaded by others, (3) which proprietie is common betweene them and coparceners; but

Bract. li. 4. fo. 202. (3) Brit. ca. 34. & fo. 113. Flet. lib. 3. ca. 4. 10. & li. 6. ca. 47. (4) (2. Ro. Abr. 36.)

7 E. 4. 89: 11 H. 4. 24. (5. Co. 62.)

Flet. lib. 6. ca. 47. Bract. lib. 5. fo. 435. a. (Noy 13. Ant. 164. Cui. Jam. 83. 166. Post. Sect. 311.

(2) [See Note 33.]

(3) I take this reference to Bracton to be erroneous. But in fol. 28. a. of Bracton there is a chapter, which connects with *Littleton's* on jointenancy; the first branch of it being *de donationibus factis pluribus simul sive successivis*. See also Bract. fo. 12. b. and 13. a.

(4) It should be cap. 48. to which as a corresponding part of an almost cotem-

porary writer add Bract. fol. 428. a.

[180. b.]

(1) [See Note 54.]

(2) [See Note 55.]

(3) See the statute *de conjunctim feoffatio* 34 E. 1. lord Coke's notice of it in 2. Inst. 527. and Theloall's Dig. Orig. Br. in the Chapter on *Jointenants* in b. 2. fol. 456.

but joyntenants have a sole qualitie of survivorship, which coparceners have not. *Littleton*, having now spoken of parceners and of joyntenants of right, doth next speake of joyntenants by wrong.

## Sect. 278.

**I**TEM, si deux ou trois, &c. disseisent un auter d'aucun terres ou tenements a leur use demesne, donques les disseisors sont joyntenants. Mes s'ils disseisent un auter al use d'un de eux, donques ils ne sont joyntenants; mes celui a que use le disseisin est fait est sole tenant, et les autres n'ont riens en le tenantie, mes sont appelle coadjutors a le disseisin, &c.

**A**LSO, if two or three, &c. disseise another of any lands or tenements to their own use, then the disseisors are joyntenants. But if they disseise another to the use of one of them, then they are not joyntenants; but hee to whose use the disseisin is made is sole tenant, and the others have nothing in the tenancy, but are called coadjutors to the disseisin, &c.

**I**T is to bee observed, that some disseisors be tenants of the land, and some be no tenants of the lands; and of both these kinds *Littleton* here speaketh.

“&c.” In the first &c. nothing is implied but foure or five, or more. But in the latter &c. many things be to bee understood. As of disseisors that be no tenants, some are coadjutors, whereof *Littleton* here speaketh, some counsellors, commanders, &c. when the disseisin is not to bee done to any of their uses. Also if *A.* disseise one to the use of *B.* who knoweth not of it, and *B.* assent to it, in this case til the agreement *A.* was tenant of the land, and after agreement *B.* is tenant of the land, but both of them be disseisors: for *omnis rati habitio retrotrahitur et mandato equiparatur.* (4) And it is worthie of the observation, and implied also in the latter &c. that seeing coadjutors, counsellors, commanders, &c. are all disseisors, that albeit the disseisor which is tenant dieth, yet the assise lieth against the coadjutor, counsellor, commander, &c. and the tenant of the land (5), though he be no disseisor. (6)

[a] The demandant and others in a *franchise* did disseise the tenant to the use of the others, and the writ did not abate; for the demandant was a disseisor, but gained no tenancy in the land, for that he was but a coadjutor.

A man disseiseth tenant for life to the use of him in the reversion, and after he in the reversion agreeth to the disseisin, it is said, that he in the reversion is a disseisor in fee, for by the disseisin made by the stranger, the reversion was divested, (7) which (say they) cannot bee revested by the agreement of him in the reversion, for that it maketh him a wrong doer, and therefore no relation of an estate by wrong can helpe him. (1)

“Coadjutor.”

(4) [See Note 56.]

(5) That is, he that is seised of the freehold by title from the disseisor, as by feoffment lease or descent from him.

(6) See ant. 154. b.

(7) [See Note 57.]

[181. a.]

(1) [See Note 58.]

20 E. 2. 2.  
17. Am. 14.  
14. Am. 13.  
8. Am. p. 50.  
10 E. 2. 47.  
10. Am. 22.  
23 H. 6. 11.  
dissid. p. 77.  
29. Am. 21.  
27. Am. 20.  
23 E. 4. 9.  
7 E. 4. 1. b.  
26. Am. 7.  
21 E. 7. 35.  
20. Am. 60.  
21 H. 6. 22.  
25 H. 6. 48.  
21 E. 4. 12.  
16 E. 4. 12.  
7. H. 6. 179. f.  
(Mss. 63. Post. 374.  
a. Abt. 10. a.  
1. Ro. Abr. 660.  
Post. 181. a.)  
(Post. 146. a.  
230. a.)  
(1. Ro. Abr. 643.)  
(a) 20. E. 3. 2.  
(Cap. Cha. 303.  
1. Ro. Abr. 661.  
662. Post. 383. a.)

"Coadjutor." Coadjutor est qui auxiliatur alteri, and is derived d'coadjuvando. Anglicè a fellow helper.

## Sect. 279.

**ET** nota que disseisin est properment, lou un home entra en aucun terres ou tenements lou son entre n'est pas congeable, et ousta celuy que ad franktenement, &c.

**A**ND note that disseisin is properly, where a man entreth into any lands or tenements where his entry is not eongeable, and ousteth him which hath the freehold, &c.

**T**HIS description of a disseisin and the &c. in this place is understood onely of such lands and tenements whereunto an entry may bee made, and not of rents, commons, &c. (2) whereof sufficient hath been said before (3) in the Chapter of Rents; and so in effect *Littleton* described it before the edition of his book. And note here, that every entry is no disseisin, unlesse there be an ouster also of the freehold. And therefore *Littleton* doth not set downe an entrie onely but an ouster also, as an entry and a claimer, or taking of profits, &c.

Now as there be joyntenants by disseisin, so are there joyntenants by abatement, intrusion, and usurpation, all which are included in the latter &c.

3 E. 4. 2.  
34. Ass. 11, 12.  
36. Ass. 17.  
41. Ass. 19.  
24 E. 3. 51.  
Pl. Com. 89.  
Parson de Hony  
Lane 7. Ass. 10.  
11. Ass. 25.  
13 E. 3. 64. Ass. 22.  
44. Ass. 7. 9. Ass. 19.  
39. Ass. 1. 18 E. 2.  
Ass. 374.

## Sect. 280.

**ET** est ascavoir, que la nature de joyntenance est, que celuy que survesquist avera solement l'entier tenance selonques tiel estate que il ad, si le joynture soit continue, &c. Si come si trois joyntenants sont en fee simple, et l'un ad issue et devie, uncore ceuz que survesquent averont les tenements entier, et l'issue n'avera riens. Et si le second joyntenant ad issue et devie, uncore le tierce que survesquist avera les tenements entier, et euz avera a luy et a ses heires a tous jours. Mes autrement est de parceners: car si trois parceners sont, et devant aucun partition fait l'un ad issue et devie, ceo que a luy affiert descendra a son issu. Et si tiel parcenier morust

**A**ND it is to be understood, that the nature of joyntenancy is, that he which surviveth shall have only the entire tenance according to such estate as he hath, if the joynture be continued, &c. As if three joyntenants bee in fee simple, and the one hath issue and dieth, yet they which survive shall have the whole tenements, and the issue shall have nothing. And if the second joyntenant hath issue and dye, yet the third which surviveth shall have the whole tenements to him and to his heires for ever. But otherwise it is of parceners; for if three parceners be, and before any partition made the one hath issue and

(2) In respect to disseisin of rents, read post. 306. b. 323. a. and b.

(3) Ant. Sect. 233. and the comment thereon.

*morust sans issue, donques ceo que a lui affiert descendra a ses coheires, issint que ils averont ceo per descent, et nemy per survivor, come joyntenants averont, &c.*

and dyeth, that whiche to him belongeth shall descend to his issue. And if such parcener die without issue, that which belongs to her shall descend to her co-heires, so as they shal have this by descent, and not by survivor, as joyntenants shall have, &c.

<sup>10</sup> *“ Si le joynture soit continue, &c.”*

Here by this, &c. many points of learning are to bee observed. As that it is proper to joyntenants onely to have lands by survivor; for no survivor of other tenants *pro indiviso* shall have the whole by survivor, but only joyntenants: and this is called in law *jus accrescendi*. *Omnes feoffati sunt simul habendi et tenendi, nec totum nec partem separatam nec per se, sed ut quilibet eorum totum habeat cum aliis in communi; et cum unus moriatur, non descendit aliqua pars heredi morientis, nec separata nec in communi ante mortem omnium, sed pars illa communis per jus accrescendi accrescit superstitibus de personâ ad personam usque ad ultimum superstitem.* But although survivorship bee proper to joyntenants, yet it is not proper *quarto modo* (that is) *omni, soli et æmpet*; for there may bee joyntenants, though there be not equall benefit of [181. b.] survivor on both sides. As if a man letteth lands to *A.* and *B.* during the life of *A.* if *B.* dyeth, *A.* shall have all by the survivor, but if *A.* dyeth, *B.* shall have nothing. (1)

(b. Co. 78. b.)

(1. Sid. 6.)

Two or more may have a trust or an authoritie committed to them jointly, and yet it shall not survive. But herein are divers diversities to be observed. First, there is a diversitie betweene a naked trust or an authoritie, and a trust or authoritie joyned to an estate or interest. (2) Secondly, there is a diversitie between authorities created by the partie for private causes, and authoritie created by law for execution of justice. As for example, [b] if a man devise that his two executors shall sel his land, if one of them dye, the survivor shall not sell it; (3) but if he had devised his lands to his executors to be sold, there the survivor shall sell it; which diversitie is implied by our author, for hee saith, that he that surviveth shall have the entire tenencie.

If a man make a letter of attorney to two, to do any act, if one of them dye, the survivor shall not do it: but if a *venire facias* be awarded to foure coroners to impannell and returne a jury, and one of them dye, yet the other shall execute and returne the same.

If a charter of feoffment [c] be made, and a letter of attorney to foure or three jointly or severally to deliver seisin, two of them cannot make livery; because it is neither by them foure or three jointly, nor any of them severally; but if the sherife upon a *capias* directed to him make a warrant to foure or three jointly or severally to arrest the defendant, two of them may arrest him, because it is for the execution of justice [d], which is *pro bono publico*, and therefore

(1) See further as to benefit of survivorship on one side only, post. 193: a 239. b. & Dy. 10. b.

(2) See ant. 112. b. 113. a. post. 297. a.

(3) [See Note 59.]

Bracton, lib. 4.  
fol. 368. b.  
Brieton, cap. 36.  
Fleta lib. 3.  
ca. 4. & ca. 10.  
d. E. 3. fol. 5, 6.

[b] 39. Am. p. 17.  
30 H. 8. tit.  
devise B. Dyes  
3 Eliz. 190.  
49 E. 3. 16.  
3 Eliz. Dyer 177.  
23 Eliz. Dyer 371.  
4 Eliz. Dyer 216.  
(Mo. 61. 341.)  
10 H. 4. 2. & 3.  
24 H. 4. 34.  
39 H. 6. 42.  
31. Am. 20.  
33 H. 8. Joynt.  
Br. 62. 30 H. 8.  
condition Br. 100.  
[c] 38 H. 8. 8.  
Dyer 62. 27 H. 8.  
fol. 6.  
(5. Co. 91.  
Yelv. 32. 36.  
Gro. Eliz. 913, 914.)

[d] Psich. 48 Eliz.  
in the king's bench  
betweene King &  
Mobbis. (Mutt 127.)



therefore shall be more favourably expounded, then when it is onely for private; and so hath it beene adjudged. (4) *Jura publica ex privato promiscue decidi non debent.*

"*Et devic.*" Note, there is a naturall death and a civil death, and *Littleton's* case is to be intended of both; and therefore [c] if two joyntenants be, and one of them entreth into religion, the survivor shall have the whole. (5)

[c] 21 R. 2.  
Judgment 203.  
(Ant. 133. b.)

## Sect. 281.

**E**T come le survivour tient lieu enter joyntenants, (6) en mesme le maner il tient lieu enter eux queux ont joynt estate ou possession ove auter de chattell, real ou personall. Sicome si las de terres ou tenements soit fait a plusors pur terme des ans, celui, que survesquist de les lessees, avera les tenements a luy entier durant le terme per force de mesme le leas. Et si un [182. a.] chival, ou un auter chattell personal sont done a plusors, celui que survesquist avera le chival solement.

**A**ND as the survivour holds place betweene joyntenants, in the same manner it holdeth place betweene them which have joynt estate or possession with another of a chattell, reall or personall. As if a lease of lands or tenements bee made to many for terme of yeares, hee, which survives of the lessees, shall have the tenements to him only during the terme by force of the same lease. (1) And if a horse, or any other chattell personall be given to many, hee which surviveth shall have the horse onely.

**H**EREBY it is manifest, that survivor holdeth place regularly as well betweene joyntenants of goods and chattels in possession or in right, as joyntenants of inheritance or freehold.

(Cro. Elin. 32.  
2 Ro. Abr. 60, 67.)

"*Chattell,*" or *Catell*, whereof commeth the word used in law [f] *Catalia*, and is, as *Littleton* here teacheth, two-fold, viz. reall and personall, and putteth examples of both.

[f] Regist.  
origin. 139. 244.  
Bract. lib. 2.  
30 Pl. 6. 35.  
Scandford Pr. 45.

## Sect. 282.

**E**N mesme le maner est de detts et duties, &c. car si un obligation soit fait a plusors pur un debt, celui qui survesquist avera tout le det ou dutie. Et issint est d'autres covenants et contracts, &c. (3)

**I**N the same manner it is of debts and duties, &c. for if an obligation be made to many for one debt, hee which surviveth shall have the whole debt or dutie. And so is it of other covenants and contracts, &c.

NOW

(4) See acc. as to warrant of the peace to two, *Lambard's Justice*, ed. 1602. p. 84.

(5) See ant. note 7. of fol. 3. b. and note 1. of fol. 132. b. Add *Ley's case* 2 Ro. Abr. 43.

(6) &c. in L. & M. and Roh.

[182. a.]

(1) [See Note 60.]

(3) No. &c. in L. & M. nor Roh.

NOW he speaketh of debts, duties, covenants, contracts, &c. (3)

(1 Ro. Abr. 6.)  
F. N. B. 117. E.  
30 E. 2. 7.

(Ant. 172. a.  
Cro. Jam. 309.  
1 Ro. Abr. 6.  
Cro. Cha. 301.  
1 Mod. 230.  
279.) (3)

"*Dets et duties, &c.*" Here by force of this *Uc.* an exception is to be made of two joynt merchants; for the wares, merchandizes, debts or duties, that they have as joynt merchants or partoners, shall not survive, but shall goe to the executors of him that deceaseth; and this is *per legem mercatoriam*, which (as hath beene said) is part of the lawes of this realm, for the advancement and continuance of commerce and trade, which is *pro bono publico*; for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet.* (4)

And to the latter *Uc.* in this Section the like exception must be made.

## Sect. 283.

**I**TEM, aucuns jointenants poient estre, que poient aver joint estate, et estre jointenants pur terme de lour vies, et uncore ils ont severall enheritances. Sicome terres soient donces a deux homes et a les heires de lour deux corps engendrés, en cest case les donees ont joint estates pur terme de lour deux vies, et uncore ils ont severall inheritances; car si l'un des donees ad issue et deoy, l'auter que survesquist avera tout per le surviveur pur terme de sa vie, et si celui que survesquist auxy ad issue et deoy, donques l'issue del un avera l'un moitie, et l'issue del auter avera l'auter moitie de la terre, et ils tiendront la terre enter eux en common, et ne sont pas jointenants, mes sont tenants en common. Et la cause, pur que tielx donees en tiel cas ont joynt estate pur terme de lour vies, est, pur ceo que al commencement les terres fueront donces a eux deux, les queux parols sans plus dire font joint estate a eux pur terme de lour vies. Car si home voit lesser terre a un auter per fail ou sans fail, nient feasant mention quel estate il averoit, et de ceo fail liveris de seisin, en ceo case le lessee ad

**A**LSO, there may be some joyntenants, which may have a joint estate, and be jointenants for terme of their lives, and yet have severall inheritances. As if lands be given to two men and to the heires of their two bodies begotten, in this case the donees have a joint estate for term of their two lives, and yet they have severall inheritances; for if one of the donees hath issue and dye, the other which surviveth shall have the whole by the survivor for terme of his life, and if he which surviveth hath also issue and die, then the issue of the one shall have the one moietie, and the issue of the other shall have the other moitie of the land, and they shal hold the land betweene them in common, and they are not joyntenants, but are tenants in common. And the cause, why such donees in such case have a joynt estate for terme of their lives, is, for that at the beginning the lands were given to them two, which words without more saying make a joint estate to them for terme of their lives.

(2) See further, as to things of which there shall be a survivorship, and where express words are necessary to give that benefit, 11. Co. 3. b. 2. Ro. Abr. 86. B. 2. 2. P. Wms. 672. and tit. *survivor* in Vin. Abr. and tit. *jointenants* B. 1. & D. ibid.

(4) See more fully as to this 2. Brownl. 99. See also acc. Noy. 53.

(5) These additional references are retained, though they scarce deserve it: for they only relate to different instances of the *lex mercatoria*, and do not touch the particular rule against the *jus accrescendi*.

*ad estate pur terme de sa vie ; et issint enfant que les terres facront donnees a eux, ils ont joint estate pur terme de leur vies. Et la cause pur que ils averont several enheritances est ceo, entant que ils ne poient aver per nul possibility un heire enter eux engender, sicome home et feme poient aver, &c. donque la ley voet que leur estate et leur inheritance soit tiel come reason voet, selonque la forme et effect des parels del donee, et ceo est a les heires que l'un engendra de son corps per aucun de ses femmes (1) [eta les heires que l'autre engendra de son corps per aucun de ses femmes] &c. issint il couvient per necessitie de reason, que ils averont severalx inheritances. Et en tiel cas si l'issue d'un des donees apres la mort des donees devie, issint que il n'ad aucun issue en vie de son corps engendre, donque le donor ou son heire poit enter en la moity come en son reversion, &c. coment que l'autre des donees ad issue en vie, &c. Et la cause est que entant que les enheritances sont several, &c. le reversion de eux en ley est several, &c. et le survivor del issue del autre ne tiendra pas lieu d'aver l'entiertie.*

as in his reversion, &c. although the other donee hath issue alive, &c. And the reason is, forasmuch as the inheritances be severall, &c. the reversion of them in law is severall, &c. and the survivor of the issue of the other shall hold no place to have the whole.

**I**Ls ont joynt estate pur terme de leur deux vies, &c." Note, albeit they have severall inheritances in taile, and a particular estate for their lives, yet the inheritance doth not execute and so breake the joyntency, but they are joyntenants for life, and tenants in common of the inheritance in taile.

Viñe Scot. 288.  
(Foot. 100. b.)

**[182. b.]** "Sicome home et feme poient aver, &c." Here a diversity is implied, when the estate of inheritance is limited by one conveyance, as in this case it is, there are no severall estates to drowne one in another. But when the states are divided in severall conveyances, their particular estates are distinct and divided, and consequently the one drownes the other. As if a lease bee made to two men for terme of their lives, and after the lessor granteth the reversion to them two, and to the heires of their two bodies, the joynture is severed, and they are tenants in common in possession. And it is further implied, that in this case of *Littleton* there is no division betweene the estate for lives, and the severall inheritances; for in this case they cannot convey away the

Viñe Westcote's  
case, 2. Co. 60, 61.  
(1. Ed. 88.)

Viñ. 12 E. 4. 2. b

(1) In L. & M. & Roh. the following words here placed between brackets are omitted.

the inheritances after their decease, (1) for it is divided only in supposition and consideration of law, and to some purposes the inheritance is said to be executed, as shall bee said hereafter.

(Sect. 284.)

[f] 30 H. 6. b. h.  
[c. Leon. 27.  
Post. 200. b.  
Civ. Jam. 200,  
361.)

If a man make a lease for [f] life, and after granteth the reversion to the tenant for life and to a stranger and to their heires, they are not joyntenants of the reversion, but the reversion is by act of law executed for the one moitie in the tenant for life, and for the other moitie he holdeth it still for life, the reversion of that moitie to the grantee.

[g] Wrotes's case,  
ubi supra.

And so it is, if a man maketh a lease [g] to two for their lives, and after granteth the reversion to one of them in fee, the joynture is severed, and the reversion is executed for the one moitie, and for the other moitie there is tenant for life the reversion to the grantee (2).

Ididem 7 H. 6.

If lessee for life granteth his estate to him in the reversion, and to a stranger, the joynture is severed and the reversion executed for the one moitie by the act of law. (3)

If a man maketh a lease for life and granteth the reversion to two in fee, the lessee granteth his estate to one [183. a.] of them, they are not joyntenants of the reversion; for there is an execution of the estate for the one moitie, and an estate for life, the reversion to the other of the other moitie (2).

[h] 17 E. 3. 61.  
78. 18 E. 3. 30.  
20 E. 3.  
Batham tit. dona.  
20 E. 3.  
Hoffmanto &  
Hals 97.

Here *Littleton* hath well resolved a doubt; for of ancient time it hath beene said, [h] that when lands have beene given to two women and to the heires of their two bodies begotten (which case our author putteth in the next Section) that the husband having issue should bee tenant by the courtesie living the other sister; for that as some held the inheritance was executed, and that the sisters were tenants in common in possession, and consequently the husband to be tenant by the curtesie, which hee could not bee if the women had a joynt estate for terme of their lives; and likewise it was said [i] that the issue of the one should recover the moytie in a *formedon* living the other sister. But *verba sunt hæc*, and *Littleton*, grounding himselfe upon good authority in law, hath cleared this doubt.

(Ant. 13. a.)

[i] 44 E. 3.  
tail. 12.  
S. Ant. 33.  
24 E. 3. 20.  
7 H. 4. 16.  
Corbet's case  
1. Co. 84. b.  
4. Mar. Dir. 148.  
See before in the  
Chapter of Ten.  
by the Curtesie,  
Sectione.  
(Ant. 30. a.)  
2. Ro. Abr. 90.  
[k] Pl. Com. in  
Throgmorton's  
case.  
(2. Co. 23. 66.  
3. Co. 111.  
2. Ro. Abr. 66.)  
Regul.  
(1. Co. 2. a.)  
Plevid. 161. a.  
Ant. 43. a.)

"*Nient feasant mention quel estate il auroit.*" Here *Littleton* addeth materially (not making mention of what estate); for [k] if in the premisses lands bee letten, or a rent granted, the general intendment is, that an estate for life passeth; but if the *habendum* limit the same for yeares or at will, the *habendum* doth qualifie the generall intendment of the premisses. And the reason of this is, for that it is a maxime in law, that every man's grant shall be taken by construction of law most forcible against himselfe. *Qualibet concessio fortissime contra donatorem interpretanda est*; which is so to be understood, that no wrong be thereby done; for it is another maxime in law, *quod legis constructio non facit injuriam*. And therefore if tenant for life maketh a lease generally, this shall bee taken by construction of law an estate for his owne life that made the [183. b.] lease; for if it should be a lease for the life of the lessee, it should be a wrong to him in the reversion. And so it is if tenant in taile make

(1) See post. 184. b.

(2) [See Note 61.]

(3) See post. 192. 200. b. 335. a.

[183. a.]

(2) [See Note 62.]

make a lease generally, the law shall contrive this to be such a lease as hee may lawfully make, and that is for terme of his owne life; for if it should be for the life of the lessee, it should be a discontinuance, and consequently the state which should passe by construction of law should worke a wrong. (1)

"*Et issint entant que les terres fueront dones a eux ils ont joynt estate pur leur vies.*" This is plaine, but with this exception, unlesse the *habendum* doth otherwise limit the same. And therefore if a lease be made [L] to two, *habendum* to the one for life, the remainder to the other for life, this doth alter the generall intendment of the premisses, (2) and so hath it beene oftentimes resolved. And so it is if a lease be made to two, *habendum* the one moiety to the one, and the other moiety to the other, the *habendum* doth make them tenants in common; and so one part of the deed doth expaine the other, and no repugnancy between them, *et semper expressum facit cessare tacitum.* (3)

[1] 8 E. 3. 487.  
tit. feoffm. &  
tails 73.  
30 H. 8. tit.  
joynt. Br. 53.  
Dyer fo. 361.  
Pl. Com. 160.  
(Hob. 171.  
Post. 190. b.  
2. Ro. Abr. 66.  
68. 1. Leon. 10.  
11.)

"*Per nul possibilitie.*" Here it is to be observed, that where the grant is impossible to take effect according to the letter, there the law shall make such a construction as the gift by possibilitie may take effect, which is worthy of observation. *Benigna facienda sunt interpretationes cartarum propter simplicitatem laicorum, ut res magis valeat quam pereat.*

Bracton.  
(2. Ro. Abr. 66.  
4. Co. 19. a.  
Hob. 313.)

"*Issint il convient per necessitie de reason.*" The reason of the law is the life of the law; for though a man can tell the law, yet if he know not the reason thereof, he shall soone forget his superficial knowledge. But when hee findeth the right reason of the law, and so bringeth it to his natural reason, that he comprehendeth it as his own, this will not onely serve him for the understanding of that particular case, but of many others; for *cognitio legis est copulata et complicata*; and this knowledge will long remaine with him. All which is plainly implied by the words and *Uc.* of our author in this Section.

"*Et en tiel case si l'issue d'un des donees apres la mort des donees devie, issint que il n'ad aucun issue en vie de son corps engendre, donques le doner ou son heire poet enter en le moitie.*" This is mistaken in the imprinting, and varieth from the originall, (4) which is, *si l'un donee ou l'issue d'un des donees apres la mort des donees devie, issint que il n'ad aucun issue, Uc.* For it is evident, that if the one donee himselfe dieth without issue, the inheritance doth revert for a moiety, and after the decease of the other donee, the donor may enter into that moiety; and whether the issue of the one donee dieth without issue at any time, either in the life of the other donee, or after his decease, it is not materiall, for whensoever no issue is remaining of the one donee, so as the state taile is spent, the donor may after the decease of the surviving donee enter into that moiety. (5)

"*Et*

(1) Acc. ant. 42. a. and there the reason is more fully expressed.

(2) Acc. Perk. sect. 174.

(3) Acc. Sect. 298. See also 2. Co. 55. a. & b. ant. 180. b. post. 189. a. 299. b.

(4) But lord Coke's correction is not conformable either to L. and M. nor the Rob. edition.

(5) See Hob. 33.

*"Et la cause est, que ensant que les inheritances, &c."* Littleton in this Chapter hath often said, *et la cause est*, which is worthie of observation, for then wee are truly said to know any thing when we know the true cause thereof. *Tunc unumquodque scire dicimur, cum primam causam scire putamus. Scire autem propriè est rem ratione et fier causam cognoscere.*

Arto. 1. Manu  
phys.

*Felix, qui potuit rerum cognoscere causas.*

Virg. 2. Georg.

And therefore all students of law are to apply their principall endeavour to attaine thereunto, all which is implied by the words and severall &c. in this Section.

Here the cause of the entrie of the donor into a moitie in this case is, that in as much as the inheritance is severall, the reversion is severall. Therefore upon the severall determination of the estate in taile, the donor may enter. And the law termeth a reversion to bee expectant upon the particular estate: because the donor or lessor, or their heirs, after every determination of any particular estate, doth expect or looke for to enjoy the lands or tenements againe.

(Post. 191. b.  
Hob. 33.)

Dyer 14 El. 280.

*"Le reversion de eux en ley est severall, &c."* Hereby, and by this &c. is implied, that upon one joint or entire gift or lease there is one joynt or entire reversion, and upon severall gifts or leases there bee severall reversions. And this is to be understood of the reversion in the donor or his heirs. But albeit the gifts or leases be severall, yet if the donors or lessors grant the reversion to two or more persons and their heirs, they are joyntenants of the reversion. And so it is of a remainder. And therefore if a gift be made to two men and the heirs of their two bodies begotten, the remainder to them two and their heirs, they are joyntenants for life, tenants in common of the state taile, and joyntenants of the fee simple in remainder; for they are joynt purchasers of [184. a.] the fee simple, and the remainder in fee is a new created estate, but the reversion remaining in the donor or his heirs is a part of his ancient fee simple.

(2. Co. 66. b.  
post. 299. b.)

### Sect. 284.

**E***T sicome est dit de males, en mesme le manner est lou terre est done a deux females, et a les heires de lour deux corps engendres.*

**A**ND as it is said of males, in the same manner it is where land is given to two females, and to the heirs of their two bodies engendred.

44 E. 2. tit.  
Taile 12.  
(Ant. 25. b.)  
(2. Ro. Abr. 48.  
1. Co. 120.  
126. b. Ant. 46. b.)  
10. Co. 50. b.)

**I**F a man giveth lands to two men and one woman, and the heirs of their three bodies begotten, in this case they have severall inheritances; for albeit it may be said, that the woman may by possibility marry both the men one after another; yet first, she cannot marrie them both *in presenti*, and the law will never intend a possibilitie upon a possibility, as first to marry the one, and then to marry the other (1); secondly, the form of the gift is, to the heirs

(1) [See Note 63.]

heires of their three bodies, which is not possible, and therefore they shall have several inheritances. And so it is, if a gift be made to one man and to two women, *mutatis mutandis*. In the same manner, if a gift in taile be made to a man and his mother, [m] or to a man and his sister (2), or to him and his aunt, &c. in this and like cases, albeit the gift is made to a man and a woman, yet they have severall inheritances; because they cannot marry together, and are within the rule and reason of our author.

[m] 18 E. 3. 39.  
7 H. 4. 16.

Sect. 285.

**I**TEM, si terres soyent dones a deux et a les heires de l'un de eux, ceo est bone jointure, et l'un ad franktenement, et l'auter ad fee simple. Et si celuy que ad le fee devie, celuy que ad le franktenement avera l'entiertie per le survivor pur terme de sa vie. En mesme le manner est, lou tenements sont dones a deux et les heires del corps d'un de eux engendres, l'un ad franktenement, et l'auter ad fee taile, &c.

**A**LSO, if lands be given to two and to the heires of one of them, this is a good joynture, and the one hath a freehold, and the other a fee simple. And if he which hath the fee dieth, he which hath the freehold shall have the entiertie by survivor for terme of his life. In the same manner it is, where tenements bee given to two and the heirs of the body of one of them engendred, the one hath a freehold, and the other a fee taile, &c.

**B**Y this Section, and the &c. in the end of it, they are joyntenants for life, and the fee-simple or estate taile is in one of them; and because it is by one and the same conveyance, they are joyntenants, and the fee-simple is not executed to all purposes as hath beene said before (3).

(3 Ca. 60. b.)

If a fine bee levied to two, [n] and to the heires of one of them, by force whereof hee is seised, he that hath fee dieth, and after the joyntenant for life dieth, and an estranger abates, in this case the heire may either suppose the fee simple executed, and have an assise of *Mortdauncester*, the words of which writ be, *Si R. pater fuit seiscitus die quo obiit in dominico suo ut de feodo*; which cannot bee said of him that hath but a remainder expectant upon an estate for life; but in respect that he is seised of a fee simple, and of a joynt estate in possession, the words in the writ be true, that he was seised *in dominico suo ut de feodo* (4). Likewise the heir may have a writ of right, which also in some sort proves the fee simple executed; or the heir may have a *scire facias* to execute the fine, by which the

(Sect. 282.)  
[n] 45 E. 3. 9.  
10. 11 H. 4. 66.  
31 E. 3. scire facias 19.  
39 H. 6.  
Mord. B. 59.  
4 E. 3. 37.  
F. N. B. 196.  
219. 4 E. 3.  
Itiner. Derby.  
34 E. 3. 70.  
(3 Co. 61.)  
(1 Ro. Abr. 606.)

[184. b.] heire supposeth that the fee was not executed, or he may maintaine a writ of intrusion where the heire maketh the like supposition, and shall terme it a remainder. (1) And yet when land

(Foot. 261.)

(2) See Dy. 326. a.  
(3) Aht. 182. b. See also post. 207. b. Fearnie on Conting. Rem. 23, 24. 26. 28, 29. Bro. Nouv. Cas. pl. 260. 303. 387. These references will introduce the reader to most of the learning on this curious

point.  
(4) See however Bro. Nouv. Cas. pl. 115. which is *contra*.

[184. b.]  
(1) [See Note 64.]

land is given to two and to the heires of one of them, he in the remainder cannot grant away his fee simple, as hath beene said. (2)

## Sect. 286.

**I**TEM, si deux joyntenants sont seises d'estate en fee simple, et l'un graunt un rent charge per son fait a un autre hors de ceo que a luy affiert (3), en cest case durant la vie le grantor le rent charge est effectuell; mes apres son decease le grant de le rent charge est void, quant a charger la terre, car celui que ad la terre per le surteitor tiendra tout la terre discharge. Et la cause est, pur ceo que celui que surresquist clayma et ad la terre per le survivor, (4) et nemy ad, ne poet de ceo claymer rien per descent de son compaignon, &c. Mes autrement est de parceners, car si soient deux parceners des tenements en fee simple, et devant ascun partition fait l'un charge ceo que a luy affiert per son fait d'un rent charge, &c. et puis morust sans issue, per que ceo que a luy affiert descend a l'auter parcener, en cest case l'auter parcener tiendra la terre charge, &c. pur ceo que il vient a cel moitie per descent. come heire, &c.

**A**LSO, if two joyntenants be seised of an estate in fee simple, and the one graunts a rent charge by his deed to another out of that which belongeth to him, in this case during the life of the grantor the rent charge is effectuell; but after his decease the grant of the rent charge is void, as to charge the land, for he which hath the land by survivor shal hold the whole land discharged. And the cause is, for that he which surviveth claimeth and hath the land by the survivor, and hath not, nor can claime any thing by descent from his companion, &c. But otherwise it is of parceners, for if there be two parceners of tenements in fee simple, and before any partition made the one chargeth that which to her belongeth by her deed with a rent charge, &c. and after dieth without issue, by which that which belongeth to her descends to the other parcener, in this case the other parcener shall hold the land charged, &c. because

shee came to this moiety by descent, as heir, &c.

**C**LAIMER riens per descent de son compaignon, &c." By which &c. is implied, that so it is if one joyntenant acknowledge a recognisance or a statute, or suffreth a judgment in an action of debt, &c. and dieth before execution had, it shall not bee executed afterwards. (5) But if execution be sued in the life of the consor, it shall bind the survivor. And it is further implied, that both in the case of the charge and of the recognisance statute and judgement, if he that chargeth, &c. survive, it is good for ever.

And so it is [o] if a man be possessed of certaine lands for term of yeares in the right of his wife, and granteth a rent charge, and dyeth, the wife shall avoyd the charge; (6) but if the husband had survived, the charge is good during the terme.

If a villeine purchase lands, and binde himselfe in a recognisance, if the lord enter before [p] execution, the lord shall avoyde the

F. N. B. 204. E. 207. 7 H. 6. 2. 13 H. 7. 22. 10 E. 3. 34. 17 R. 2. tit. charge 15. 8 H. 5. 2. Vide Sect. 289. (6 Co. 79. b.)

[c] 9 H. 6. 32. (Hob. 3. Plowd. 418. b.)

[p] 9 E. 3. tit. execution Stat. them.

(2) [See Note 65.]

(3) &c. in L. and M. & Roh.

(4) &c. in L. and M. & Roh.

(5) See acc. 7 H. 7. 13. b. & 2 Ro. Abr. 88.

(6) [See Note 66.]



the same, as hath beene said. But otherwise it is if he had made a lease for yeares, for the reason that *Littleton* here yeeldeth in this Section. (7)

If two joyntenants bee of a terme, [q] and the one of them grant  
[185. b.] to *I. S.* that if he pay to him ten pound before *Michaelmasse*, that then he shall have his terme, the grantor dyeth before the day, *I. S.* payes the summe to his executors at the day, yet hee shall not have the tearme, but the survivor shall hold place; for it was but in nature of a communication: (1) but if he had made a lease for yeares, to begin at *Michaelmasse*, it should have bound the survivor. (2)

And where *Littleton* putteth the case of a rent charge, it is so likewise implied, that if one joyntenant granteth a common of pasture, or of turbary, or of estovers, or a corody, or such like, out of his part, or a way over the land, this shall not bind the survivor: for it is a maxime in law, that *jus accrescendi præfertur oneribus*; and there is another maxime, that *alienatio rei præfertur juri accrescendi*.

If one joyntenant in fee simple be indebted to the king, and dyeth, [r] after his decease no extent shall be made upon the land in the hands of the survivor.

If a recovery be had against one joyntenant, who dyeth before execution, the surviour shall not avoid this recovery: because that the right of the moitie is bound by it.

If one joyntenant in fee take a lease for yeares of an estranger by deed indented and dyeth, the surviour shall not be bound by the conclusion; because he claymes above it, and not under it.

“*Et la cause est, pur ceo que celui que survesquist claime et ad la terre per survivor, &c.*” Here againe *Littleton* sheweth the reason: and the cause, wherefore the surviour shall not hold the land charged, is, for that he claymeth the land from the first feoffor, (3) and not by his companion, which is *Littleton's* meaning when he saith, (that he claimeth by survivor) for [s] the surviving feoffee may plead a feoffment to himselfe without any mention of his joynt feoffee. (4) And this is the reason, that if two joyntenants bee in fee, and the one maketh a lease for yeares, reserving a rent and dyeth, the surviving feoffee [t] shall have the reversion by survivor, but he shall not have the rent, because he claimeth in from the first feoffor, which is paramount the rent. If there be two joyntenants in fee, and the one joyntenant granteth a rent charge out of his part, and after releaseth to his joynt companion and dyeth, he shall hold the land charged, for that he is out of the reason and cause set downe by *Littleton*, because he claimeth not by survivor, in as much as the release prevented the same. And of this opinion was *Littleton* himselfe [u] before the edition of his booke, But all men agree, that if *A. B.* and *C.* be joyntenants in fee, and *A.* chargeth his part and then releaseth to *B.* and his heirs, and dyeth, that the [w] charge is good for ever; because in that case *B.* cannot be in from the first feoffor, because he hath

[q] 14 H. 2. 22.  
Pl. Com. 263. b. in  
dame Hale's case.  
(Finch's 1. 97.  
6. Co. 35. 2. Ro.  
Abr. 88, 89.  
Cro. Jam. 91, 92.)

45 E. 3. 13.  
Vide Sect. 289.

[r] 40. Ass. 36.  
20. Ass. 6.  
F. N. B. 149. q.  
Pl. Com. 321.  
(1. Co. 56. Post.  
392. a.)

[s] 14 E. 4. 1. b.  
16 E. 2. briefe 280.  
8 E. 2. entry 77.  
16 E. 3. 28.  
38 E. 3. 20.  
8 H. 6. 28.  
Vid. 46 E. 3. 77.  
35 H. 6. 39.  
[t] Dier Mich.  
2 & 3 Eliz. 187.  
Hib. 1. fol. 90.  
Vide lib. 6.  
fol. 78, 79.  
(Post. 318. a.)

[u] 33 H. 6. 5. a.  
9 Eliz. Dyer 263.

[w] 37 H. 2.  
tit. alienation  
Br. 31.

(7) See also the reason given in Sect. 289.

(2) See post. Sect. 289.

(3) [See Note 67.]

(4) Acc. F. N. B. 219. B.

[185. a.]

(1) See Dy. 337. a.

10 E. 4. 2. b.  
40 E. 3. 41. b.  
33 H. 6. 2.  
22 H. 6. 42. b.  
per Pole.  
35 E. 3. release 43.  
33 E. 3.  
avowry 105.  
14 H. 3. 2. (6).  
(Cro. Jam. 604.  
Plowd. 198.  
6 Co. 70. a.  
2 Co. 145.  
9 Co. 107. b.  
Fest. 233. b.)

hath a joynt companion at the time of the release made, and severall writs of *fræcipe* must be brought against them. (5) And albeit the release of one joyntenant to the residue of the joyntenants makes no degree in supposition of law, neither is there any severall estate between them, but the estate of him that releaseth is as it were extinguished and drowned in their estate and possession, so as one *fræcipe* lyeth against them, (7) yet shall they hold the land charged as is aforesaid. As if tenant for life grant a rent charge, and after surrendreth his estate to the lessor, albeit the estate charged be drowned, and the lessor is not in by him, yet hee shall hold it charged. (8)

"*Mes autrement est de parceners, car si sont deux parceners, &c.*" This is to be intended as well of parceners by custome as of parceners by the common law; and here is implied the reason of the diversitie, for that the survivor doth claime above the charge, and the heire by descent under the charge. (9)

## Sect. 287.

**I**TEM, si sont deux joyntenants des terres en fee simple deins un burgh, lou les terres et tenements sont devisables per testament, et si l'un de les dits deux joyntenants devise ceo que a luy affiert per son testament, &c. et morust, ceo devise est voide. Et la cause est, pur ceo que nul devise poit prender effect mes apres la mort le devisor, et per sa mort tout la terre maintenant devient per la ley a son compaignon, que survesquist, per le survivor; le quel il ne claime, ne ad riens en la terre per my le devisor, mes en son droit demeane per le survivor solonque le course de ley, &c. et pur cel cause tiel devise est voide. Mes autrement est de parceners seisis des tenements devisables en tiel case de devise, &c. *causa qua supra*.

**A**LSO, if there bee two joyntenants of land in fee simple within a borough, where lands and tenements are devisable by testament, and if the one of the said two joyntenants deviseth that which to him belongeth by his testament, &c. and dieth, this devise is voide. And the cause is, for that no devise can take effect till after the death of the devisor, and by his death all the land presently commeth by the law to his companion, which surviveth, by the survivor; the which hee doth not claime, nor hath any thing in the land by the devisor, but in his owne right by the survivor according to the course of law, &c. and for this cause such devise is void. But otherwise it is of parceners seised of tenements devisable in like case of devise, &c. *causa qua supra*.

"**P**ER son testament, &c." Either in writing, or nuncupative, according to the custome.

"*Et*

(5) As to the partial effect of such a release on the jointenancy, see post. Sect. 304.

(6) It should be 12. a.

(7) See the case of waste in Brownl. Rep. 238.

(8) Acc. 338. b. 238. b.

(9) In Calthrope's reading on Copyholds 64. the doctrine of admission on the death of copyholders being jointenants or parceners is stated according to this diversity.

"*Et la cause est, sur ceo que nul devise poet prendre effect mes apres le mort le devisor (10) et per sa mort tout la terre maintenant devient per la ley a son compaignon, &c.*" Here both their  
 [185. b.] claimes commence at one instant: and although an instant *est unum indivisible tempore quod non est tempus nec pars temporis, ad quod tam. n. partes temporis connectuntur*, and that *instans est finis unius temporis et principium alterius*; (1) yet in consideration of law there is a prioritie of time in an instant, as here the survivor is preferred before the devise; for *Littleton* saith, that the cause is that no devise can take effect till after the death of the devisor, and by his death all the land presently commeth by the law to his companion. Whereby it appeareth, that *Littleton* by these words *post mortem et per mortem*, though they jump at one instant, yet alloweth priority of time in the instant which he distinguisheth by *per* and *post*. And the reason of this prioritie is, that the survivor claymeth by the first feoffor (as hath bin said) and therefore in judgment of law his title is paramount the title of the devisee, and consequently the devise void, and the rule of law is, that *jus accrescendi prefertur ultima voluntati*. (2)

Two fems joyntenants of a lease for yeares, one of them taketh husband and dieth, yet the terme shall survive; for though all chattels reals are given to the husband, if he survive, yet the survivor between the joyntenants is the elder title, and after the marriage the feme continued sole possessed; for, if the husband dyeth, the feme shall have it, and not the executors of the husband. (3) But otherwise it is of personall goods.

If a man be seised of a house, and possessed of divers heirlomes, that by custome have gone with the house from heire to heire, and by his will deviseth away the heirlomes, this devise is void; for, as *Littleton* here saith, the will taketh effect after his death, and by his death the heirlomes by ancient custome are vested in the heire (4), and the law preferreth the custome before the devise. And so it is if the lord ought to have a herriot when his tenant dieth, and the tenant deviseth away all his goods, yet the lord shall have his herriot for the reason aforesaid. And it hath been anciently said, that the herriot shall bee paid before the mortuary. [*x*] *Imprimis autem debet quilibet, qui testaverit, dominum suum de meliore re quam habuerit recognoscere, et postea ecclesiam de alia meliore, &c.* wherein the lord is preferred, for that the tenure is of him. This dutie to the lord is very antient; for in the lawes before the Conquest it is said, *sive quis incuria, sive morte repentinâ, fuerit intestat' mortuus, dominus tamen nullam rerum suarum partem (preter eam quæ jure debetur herioti nomine) sibi assumit* (6). In the Saxon tongue it is called *heregeat*, as much to say (as I take it) as the lord's [beste]; for *here* is lord, and *geat* is [beste]. But let us returne to *Littleton*.

"*Mes*

(10) Acc. ant. 112. a. b. as a reason for the goodness of a devise by husband to wife.

[185. b.]

(1) [See Note 68.]

(2) Acc. as to goods, Office of Exec. ed. 1676. p. 26. Perk. sect. 526. Swinb. on Testam. part 3. sect. 6.

(3) See ant. 46. b. post. 351. a. and the case of a purchase by husband and wife jointly, the former being a villein, in 2. Ro. Abr. 733. D. pl. 2.

(4) Acc. ant. 18. b.

(5) It should be cap. 57.

(6) See this same passage cited ant. 176. b.

Pl. Com. in Fulmerston's case.

(Plowd. 288. b. Ant. 30. a.)

(Plowd. 418. Hob. 3. Cro. Eliz. 33.)

1 H. 5. enscutours 106.

[x] Fleta, lib. 2. cap. 80. (5) Bracton lib. 2. fol. 60. Britton fol. 178. Lamb. fol. 119. 58.

*"Mes autrement est de parceners seisis des tenements devisable en tiel case del devise, &c. causà qu'à suprà"*

The reason is evident, for that, there is no surviour between co-parceners, but the part of the one is descendible, and consequently may be devised.

## Sect. 288.

[186. a.]

**I**TEM, il est communement dit, que chescun joyntenant est seisie de la terre qu'il tient joyntment (1) per my et per tout; et ceo est aulant a dire, qu'il est seisie per chescun parcel et per tout, &c. et ceo est voier, car en chescun parcel, et per chescun parcel, et per tous les terres et tenements, il est joyntment seisie ovesque son compaignon. (2)

**A**LSO, it is commonly said, that every jointenant is seized of the land which hee holdeth jointly per my et per tout; and this is as much to say, as he is seised by every parcell and by the whole, &c. and this is true, for in every parcell, and by every parcell and by al the lands and tenements, he is joyntly seised with his companion.

Vide Sect. 097.

**I**TEM, est communement dit, &c." That is, it is the common opinion, and *communis opinio* is of good authoritie in law. *A communi observantiâ non est recedendum*, (3) which appeareth here by *Littleton*.

(Post. 350. a.  
2. Co. 66. b.  
2. Ro. Abr. 96.)  
Vide Bracton  
lib. 1. fo. 430.  
Britton cap. 32.  
Fleta lib. 3. cap. 4.  
40 E. 3. 40.  
18 E. 3. bre. 331.  
35 H. 6. 39.  
Vide the second  
part of the institu-  
tions upon the 6.  
chapter of the sta-  
tute de bigamis.  
Fleta lib. 1. cap. 28.  
40. Ass. 70.  
48 E. 3. 16.  
[y] Vid. 6. E. 3. 4.  
7 E. 4. 39.  
11. El. Dyer 183.  
(2. Co. 58. a.  
Cro. Jam. 91.  
1. Leon. 47.)  
[z] Pl. Com. in  
Browning's case.  
fol. (132. a.)  
(Post. 192. a.)

*"Per my et per tout." Et sic totum tenet et nihil tenet, scilicet totum conjunctim, et nihil per se separatim.* And albeit they are so seised (as for example, where there be two joyntenants in fee) yet to divers purposes each of them hath but a right to a moitie; as to enfeoffe give or demise, or to forfeit (4) or lose by default in a *præcipe*. (5) If my villein [y] and another purchase lands to them two and their heires, I may enter into a moity.

And where all the joyntenants joine in a feoffment, every of them in judgment of law doth give but his part. (6) If an alien and a subject purchase lands joyntly, the king upon office found shall have but a moity. (7) And *Littleton* afterwards in this Chapter (8) saith, that one joyntenant hath one moity in law, and the other the other moity. And therefore if two joyntenants be [z] and both they make a feoffment in fee upon condition, and that for breach thereof one of them shall enter into the whole, yet he shall enter but into a moitie, because no more in judgment of law passed from him: (9) and so it is of a gift in taile or a lease for life, &c.

Yet

- (1) *Uc.* in L. & M. & Roh.
- (2) *Uc.* in L. & M. & Roh.
- (3) [See Note 69.]
- (4) Acc. as to copyholders being jointenants *Calthrope's Reading* 97. *Kitch. French ed.* 82. a.
- (5) See ant. 125. 5.
- (6) Acc. 11 H. 7. a. pl. 5.

- (7) See ant. 180. and note 2 there.
- (8) Post. Sect. 291.
- (9) See ant. 47. a. & post 214. a. the case of a lease by two jointenants with reservation of rent to one, and the difference there taken between such a lease, by *parol* and one by *deed indented*. See also Dy. 263. a.

Yet every joyntenant may warrant the whole; [a] because a man may warrant more then passeth from him. (10)

If two joyntenants make a feoffment in fee [b] and one of the feoffors dye, the feoffee cannot plead a feoffment from the survivor of the whole, because each of them gave but his part; but otherwise it is on the part of the feoffees, as hath beene said before.

And where two joyntenants be, the one of them [c] may make the other his baylife of his moiety, and have an action of account (11) against him. And one joyntenant [d] may let his part for yeares or at will to his companion.

If two joynteanants be of certaine lands, and the one of them by deed indented [e] bargaineth and selleth the lands, and the other joyntenant dyeth, and then the deed is inrolled, there shall passe nothing but the moiety which the bargainer had at the time of the bargain. (12)

[a] Vide the second part of the Institutes upon the 6. chapter of the statute of bigamis. [b] 14 E. 4. 5. and the other bookes abovesaid.

[c] 21 E. 3. 60. (Post. 200. b.) [d] 11 H. 3. 60. 33. (Post. 193. b. 335. a.)

[e] 6 E. 6. c. Faits inroll. 9 Br. (Cra. Cha. 217. 269. 1 Co. 173.)

## Sect. 289.

**I**TEM, si deux joynt-tenants sont scises de certain terres en fee simple, et l'un lessa, ceo que a luy affiert a un estranger pur terme de 40 ans, et devie devant le term comence, ou deins le terme, en cest case apres son decease le lessee poet enter et occupier la moitie a luy lesse durant le terme, &c. coment que le lessee n'avoit unques possession de ceo en la vie le lessor, per force de mesme le lease, &c. Et le diversitie perenter le case de grant de rent charge (1) [avantdit, et cest case, est ceo. Car en grant de rent charge per] joyntenaunt, &c. les tenements demurgent tous foits come ils fueront adevant, sans ceo, que aucun ad aucun droit d'aver aucun parcell de les tenements forsque eux mesmes, et les tenements sont en tiel plyte come ils fueront devant le charge, &c. Mes ou lease est fait per un joyntenant a un auter pur terme des ans, &c. mainlenaunt per force de le lease le lessee ad droit en mesme la terre, c'est us; avoir, de tout ceo que a son lessour affiert, et d'aver ceo per force

**A**LSO, if two joyntenants beo seised of certain lands in fee simple, and the one letteth that to him belongeth to a stranger for terme of forty yeares, and dyeth before the terme beginneth, or within the terme, in this case after his decease the lessee may enter and occupie the moiety let unto him during the terme, &c. although the lessee had never the possession thereof in the life of the lessor, by force of the same lease, &c. And the diversitie betweene the case of a grant of a rent charge aforesaid, and this case, is this. For in the grant of a rent charge by a joyntenant, &c. the tenements remaine alwayes as they were before, without this, that any hath any right to have any parcell of the tenements but they themselves, and the tenements are in the same plight as they were before the charge, &c. But where a lease is made by a joyntenant to another for terme of yeares, &c. presently by force of the lease the lessee

(10) See post. Sect. 700.

(11) See ant. 172. a.

(12) See ant. 147. b.

[186. b.]

(1) The following words between brackets not in L. & M. nor Rob.

*force de mesme le lease durant son terme.* (2) *Et ceo est la diversitie.* (3) lessee hath right in the same land, (*videlicet*) of all that which to the lessor belongeth, and to have this by force of the same lease during his terme. And this is the diversitie.

**"P**ER *force de mesme le dit lease, &c.*"

By this &c. is implied, [f] that where our author speaketh of joyntenants seised in fee, that so it is if two be seised for life, and one make a lease to begin presently or *in futuro*, and dieth, this lease shall binde the survivor, as it hath been [180. b.] adjudged. (4) [g] And if one joyntenant grant *vesturam terre*, or *herbagium terre*, for yeares, and dieth, this shall binde the survivor; for such a lessee hath right in the land. So it is if two joyntenants be of a water, and the one granteth the severall piscuary.

[f] Vid. Sect. 288. & 680. & Sect. 2. (Dy. 187. a. 2 Ro. Abr. 69.)

[g] 11 H. 4. 90. 14 H. 4. 6. 17 E. 4. 6. a. 9 H. 4. 52. 21 H. 7. 50. 14 H. 7. 4. 18 E. 3. execution 56.

11 El. Dy. 228. Plow. Com. 100. a. Tempe E. 1. Am. 422. 26 H. 6. 4. 7 H. 7. 12. 10 H. 7. 24. (Ant. 4. b.)

**"L'un lessa."** The one letteth. If two joyntenants bee of an advowson, and [h] the one presenteth to the church, and his clerke is admitted and instituted, this in respect of the privy shall not put the other out of possession; (5) but if that joyntenant that presenteth dieth, it shal serve for a title in a *quare impedit* brought by the survivor. (6) But yet if one joyntenant or tenant in common present, or if they present severally, the ordinary may either admit or refuse to admit such a presentee, unlesse they joyn in presentation, and after the sixe moneths he may in that case present by lapse (7).

[h] 6 E. 3. 38. 29. 62. 7 E. 3. 50. 21. 17 H. 3. 75. b. 22 E. 3. 9. 20 E. 4. 10. 31 H. 4. 54. 18 E. 3. Decr. presentment 11. 10 E. 4. 94. 1 H. 7. 1. b. 2 H. 3. Quar. Imp. 108. 9 El. Dy. 259. 20 H. 1. Br. present. 27 E. 3. 10. 11. 5 H. 7. 8. 6 E. 4. 10. b. Decr. & Scod. 116. 34 H. 6. 46. 20 E. 3. Quar. Imp. 63. F. N. B. 34. V. (2 Ro. Abr. 255.)

But if two or more coparceners bee, [i] and they cannot agree to present, the eldest shall present; and if her sister doth disturbe her, she shall have a *quare impedit* against her; and so shall the issue and the assignee of the eldest, and yet he is tenant in common with the youngest. (8) And in the same manner the tenant by the curtesie of the eldest shall present. But if there bee foure coparceners, and the eldest and the second present, and the other two present joyntly or severally, the ordinary may refuse them all; for the eldest did not present alone, but she and one other of her sisters. But now let us returne to *Littleton*. (9).

[i] Bract. E. 4. 28. 288. 247. Brit. fo. 222. 48 Ed. 3. Fines 41. 15 E. 2. Quar. Imp. 176. 38 H. 6. 5. 19 E. 3. 10. 50. 4 E. 3. 10. F. N. B. 34. V. (Plowd. 338. b. 333. a. 10. Co. 135. b. 2. Ro. Abr. 346. F. N. B. 33. E. Ant. 256. b. Post. 243. a. & Sect. 299.)

(2) *vic* instead of *terme* in L. & M. & Roh.

(3) &c. in L. & M. & Roh.

(4) See acc. Cro. Jam. 91. & 2. Brownl. 175.

(5) See post. 243. a. 249. a.

(6) [See Note 70.]

(7) See 5 Il. 7. 8. a. Burn. Ecc. L. tit.

advowson Wats. Compl. Incumb. c. 8.

(8) See my note on this subject ant. 166. b. Hob. 199. Dy. 55. a.

(9) See further on presentation where more than one have an interest in an advowson, 2. Gibs. Cod. 1st. ed. 804. ant. 17. b. 18. a. 17. Vin. Abr. 352. Malory's *Quare Impedit* 71. to 75.

[187. a.]

## Sect. 290.

**I**TEM, joyntenants (s'ils voilent) poient faire partition enter eux, et la partition est assets bon ; mes de ceo faire ils ne serront compels per la ley ; mes s'ils voilent faire partition de leur proper volunt et agreement, le partition estoiera en sa force.

**A**LSO, joyntenants (if they will) may make partition betweene them, and the partition is good enough ; but they shall not bee compelled to doe this by the law ; but if they will make partition of their own will and agreement, the partition shal stand in force.

**P**OYENT faire partition." But this partition must bee [k] by deed, as hath beene said before. But joyntenants for yeares may [l] make partition without deed.

(Post. 192. b.)  
[k] Vid. Sect.  
359. 318.  
(Ant. 169. a.)  
F. N. B. 62. c.)  
[l] 18 El. Dyer  
350.  
F. N. B. 62. b.

**"Ils ne serra compell."** This is true regularly ; but, by the custome of some cities and boroughs, one joyntenant or tenant in common may compell his companion, by writ of partition grounded upon the custome, to make partition (1). But since *Littleton* wrote joyntenants and tenants in common generally are compellable to make partition by writ framed upon the statutes [m] of 31 & 39 H. 8. as before hath been said. (2) And albeit they be now compellable to make partition, yet seeing they are compellable by writ, they must pursue the statutes, and cannot make partition by *parol*, for that remaines at the common law. And by *Littleton's* authoritie herein it seemeth to me, that if one joyntenant or tenant in common disseise another, and the disseisee bring his assise for the moytie, that in this case, though the plaintife prayeth it, yet no judgement shall bee given to hold in severaltie, for then at the common law there might have beene by compulsion of law a partition between joyntenants and tenants in common, and by rule of law the plaintife must have judgement according to his pleint or demand.

If two joyntenants be [n] of land with warranty, and they make partition by writing, the warrantie is destroyed ; but if they make partition by writ of partition upon the statute, the warrantie remaines, because they are compellable thereunto (3)

[m] 31 H. 8.  
ca. 1. 32 H. 8.  
ca. 32. Vid. Sect.  
354. 247. 359.  
Hob. 19 & 17  
El. 1. 340. inter.  
Harris & Eden  
adjudge ass.  
19 El. Dy. 350. b.  
Vide before in the  
Chapter of Partit-  
tion many bookes  
cited concerning  
this matter.  
(Ant. 175. a.)  
Sect. 340. Mo.  
30. Dy. 350.  
Ant. 167. b.  
3 E. 3. 48.  
F. N. B. 9 b.  
7 Am. 10.  
7 E. 3. 29.  
10 Am. 17.  
10 E. 3. 40. 43.  
13 Am. 15. 17.  
13 E. 3. Judgement  
108.  
Brit. 60. 123. Ed. 6.

20 E. 3. Am. 62. 28 Am. 35. 23 Am. 10. 7 H. 6. 4. 10 H. 6. 45. 3 E. 4. 10. Vid. Sect. 247.  
26. 12. & 13. Morris's case. [n] 29 E. 3. tit. Garr.

(1) For instances of such custom, see for London F. N. B. 62. b. and for gavelkind land ant. Sect. 265. and Robins. on Gavelk. 108.

(2) [See Note 71.]

(3) Acc. ant. 165. a. and b. as to parceners, because they are compellable to make partition at common law. See the case of aid between parceners after partition, ant. 174. a. and b.

## Sect. 291.

**I**TEM, si un joynt estate soit fait de terre a le baron et a sa feme et a un tierce person, en ceo cas le baron et sa feme n'ont en ley en lour droit forsque le moitie, &c. (4) [et le tierce person arera tant come le baron et sa feme ont, seil. l'auter moitie, &c.] Et la cause est, pur ceo que le baron et sa feme ne sont forsque un person en ley, et sont en semblable case sicome estate soit fait a deux joyntenants, ou l'un ad per force de joynture l'un moitie en ley, et l'auter, l'auter moitie, &c. (1) En mesme le maner est lou estate est fait a le baron et a sa feme et as auters deux homes, en tiel cas le baron et sa feme n'ont forsque la tierce part, et les auters deux homes les auters deux parts, &c. causà qua supra.

**P**LUIS serra dit del matter touchant joyntenancie, en le Chapter de Tenants en Common, et Tenant per Elegit, et Tenant per Statute Merchant.

(Post. 399. b. 361. a. 3. Co. 66.)  
[o] Mich.  
33 E. 3. coroner  
rege Salop. in  
Thesaur.  
(Post. 394. a. 1. Ro. Abr. 318, 389. 9 Co. 140.)

Wile Sect. 685.

**A**LSO, if a joynt estate be made of land to a husband and wife and to a third person, in this case the husband and wife have in law in their right but the moitie, and the third person shall have as much as the husband and wife, viz. the other moitie, &c. And the cause is, for that the husband and wife are but one person in law, and are in like case as if an estate be made to two jointenants, where the one hath by force of the joynture the one moitie in law, and the other, the other moitie, &c. In the same manner it is where an estate is made to the husband and wife and to two other men, in this case the husband and wife have but the third part, and the other two men the other two parts, &c. *causa qua supra*.

**M**ORE shall be said of the matter touching jointenancy, in the Chapter of Tenants in Common, and Tenant by Elegit, and Tenant by Statute Merchant.

**I**E baron et sa feme n'ont en ley en lour droit forsque le moitie, &c." William Ocle and Joane his wife [o] purchased lands to them two and their heires; after William Ocle was attainted of high treason for the murder of the king's father E. 2. and was executed; Joan his wife survived him; E. 3. granted the lands to Stephen de Bitterly and his heires: John Hawkins the heire of the said Joan in a petition to the king discloseth this whole matter, and upon a *scire facias* against the patentee hath judgment to recover the lands, for the reason here yielded by our author. [187. b.]

But if an estate be made to a man and a woman and their heires before marriage, and after they marry, the husband and wife have moities between them, which is implied in these words of our author, *baron et sa feme*. (2)

"Forsque

(4) The words following between brackets not in L. and M. nor Roh.

[187. b.]

(1) No &c. in L. and M. nor Roh.

(2) See acc. as to this difference between a joint estate to husband and wife before mar-

riage and one after, Calthrop's Read. 92. Copyh. 92. F. N. B. 194. B. See further case of Butler and Baker 3. Co. the case of Margery More ant. 133. a. the case of 4. Ass. 4 cited in 1. Ro. Abr. 271. and the case of Ward and Walthew Yelv. 101.



"*Foraque un person en ley.*" Bract. saith [h] *vir et uxor sunt quasi unica persona, quia caruna et sanguis unus.* (3) It hath bin said, that if a reversion bee granted to a man and a woman and their heires, and before attornment they entermarrie, and then attornment is made, that the husband and wife shall have no moities in this case, (4) no more than if a charter of feoffment be made to a man and a woman, with a letter of attornie to make livery, they entermarry, and then liverie is made *secundum formam chartæ*, in which case it is said that they have no moities. But certain it is, that if a feoffment were made before the stat. of 27 H. 8. of uses to the use of a man [q] and a woman, and their heirs, and they entermarry, and then the statute is made, if the husband alien it is good for a moiety; for the statute executes the possession according to such qualitie, manner, forme, and condition, as they had in the use, so as though it vest during the coverture, yet the act of parliament executes several moities in them, seeing they had several moities in the use. (5)

If an estate be made to a villeine and his wife [r] being free, and to their heires, albeit they have severall capacities, viz. the villeine to purchase for the benefit of the lord, and the wife for her owne, yet if the lord of the villeine enter, and the wife surviveth her husband, she shall enjoy the whole land, because there be no moities betweene them.

A man makes a lease to A. and to a baron and feme, viz. to A. for life, to the husband in taile, and to the feme for yeares, in this case it is said, that each of them hath a third part in respect of the severaltie of their estates.

If a feoffment be made to a man and a woman and their heires with warrantie, [s] and they entermarrie, and after are impleaded and vouch and recover in value, moities shall not be betweene them; for though they were sole when the warrantie was made, notwithstanding at the time when they recovered and had execution they were husband and wife, in which time they cannot take by moities.

Albeit baron and feme (as *Littleton* here saith) be one person in law, so as neither of them can give any estate or interest to the other, (6) yet if a charter of feoffment bee made to the wife, the husband as attorney to the feoffor may make liverie to the wife; (7) and so a feme covert, that hath power to sell land by will, may sell the same to her husband, because they are but instruments for others, and the state passeth from the feoffor or devisor.

If a husband, wife, and a third person purchase lands to them and their heires [t] and the husband before the statute of 32 H. 8. cap. 1. had aliened the whole land to a stranger in fee, and died, the wife and the other joyntenant were joyntenants of the right, and

[p] Bract. li. 2. fo. 418. 30 H. 3. Discent 52. lib. 4. fo. 66. Tollet's case. Pl. Com. 483. Nichols case.

[q] 4 Mar. Dyer 149. 3 Man. Dyer 123. 29 H. 8. Dyer 22.

[r] 40 Ass. p. 7.

[s] Pl. Com. 482. Nichols case.

10 H. 7. 26.

[t] 11 E. 3. cul in vita 9. 16 E. 3. ibid. 36 E. 3. ib. 30. 35. Ass. pl. 16. 31 H. 6. tit. Ent. congrable 54. 19 H. 6. 45. F. N. B. 193. k.

(3) See ant. 112. a. where the same passage from Bracton is cited.

(4) See acc. post. 810. a. and there the doctrine is more positively expressed. See further the case of a lease for life to baron and feme and afterwards Confirmation,

post. 299. b.

(5) See Dy. 200. a.

(6) Acc. ant. 112. a. and observe note 6. there.

(7) Acc. ant. 52. a.

if the wife had died, the other joyntenant should have had the whole right by survivor (1), for that they might have [188. a.] joyned in a writ of right (2), and the discontinuance should not have barred the entrie of the survivor, for that he claymed not under the discontinuance, but by the title paramount above the same by the first feoffment (3), which is worthie of observation. But if the husband had made a feoffment in fee but of the moity, and he and his wife had dyed, their moity should not have survived to the other.

And for the better understanding of this diversity divers things are worthy of observation.

Vide Sect. 302.  
(Post. 337. b.)

First, that a right of action and a right of entrie may stand in joynture; for at the common law the alienation of the husband was a discontinuance to the wife of the one moity, and a disseisin of the other, so as after the death of the husband, the wife hath a right of action to the one moity, and the other joyntenant a right of entrie into the other, but they are joyntenants of the right, because they may joyne in a writ of right.

\* Vide the statute  
of 35 H. 8. 2. It is  
no discontinuance  
at this day.

Secondly, that a right of action or a bare right of entrie cannot stand in joynture with a freehold or inheritance in possession, and therefore if the husband make a feoffment of the moitie, this was a discontinuance of that moity,\* and the other joyntenant remained in possession of the freehold and inheritance of the other moity, which for the time was a severance of the jointure (4); and so are all the bookes, which seemed to varie amongst themselves, cleerely reconciled.

[u] Pl. Com. 419.  
Bratchbridge  
case.

If two joyntenants be of a rent, and the one of them disseise the tenant of the land, [u] this is a severance of the joynture for a time; for the moitie of the rent is suspended by unitie of possession (5), and therefore cannot stand in joynture with the other moitie in possession. And this is to be observed, that there shall never be any survivor, unlesse the thing be in joynture at the instant of the death of him that first dyeth: (6) for the rule is, *nihil de re accrebit ei, qui nihil in re quando jus accresceret habet*.

40 E. 3. 21.  
19 H. 6. 45.  
37 E. 3. 8.  
2 E. 4. 16.

Also if a man demiseth lands to two, to have and to hold to the one for life, and the other for yeares, they are no joyntenants; for a state of freehold cannot stand in joynture with a terme for yeares; and a reversion upon a freehold cannot stand in joynture with a freehold and inheritance in possession, as shall be said in the next Chapter (7). Neither can a seisin in the right of a politike capacity stand in joynture with seisin in a naturall capacity, as shall be said hereafter (8).

If two femes be joyntly seised, and they take barons, and the barons joyne in an alienation and dye, the wives are joyntenants of the right, and may joyne in a writ of right; and yet they may have severall writs of *cui in vita* at their election; but when they have recovered in those severall writs, they shall be joyntenants againe. But if the barons had aliened severally, this had bin a severance of the joynture for a time, for the reason abovesaid.

If two joyntenants, the one for life, and the other in fee, lose by default, the one shall have a writ of right, and the other a *quod ei de forceat*; and yet when they have severally recovered, they shall be joyntenants

(1) Acc. 2. Ro. Abr. 88. D. pl. 3.

(2) See post. 337. a.

(3) See post. 364. b. and ant. 185. a.

(4) Acc. post. 337. b.

(5) See ant. 148. b.

(6) Acc. post. 193. a.

(7) Post. Sect. 302. near the end.

(8) Post. Sect. 297.

joyntenants againe (9). So it is if two joyntenants bee disseised, and an assise is brought, and the one is summoned and severed, and the other recover the moitie, and after another assise is brought, and he that recovereth is summoned and severed, and the other recover, albeit they severally recover, yet they are joyntenants againe (10).

And in all cases where the joyntenants pursue one joynt remedy, and the one is summoned and severed and the other recover, he that is summoned and severed shall enter with him; but where their remedies be severall, there the one shall not enter with the other, till both have recovered: and the same law is of coparceners. If lands [w] be demised for life, the remainder to the right heires of *I. S.* and of *I. N.* *I. S.* hath issue and dieth, and after *I. N.* hath issue and dieth, the issues are not joyntenants, because the one moity vested at one time, and the other moity vested at another time (11). And yet in some cases there may be joyntenants, and yet the estate may vest in them at severall times.

If a man [x] make a feoffement in fee to the use of himselfe and of such wife as he should afterwards marrie, for terme of their lives, and after he taketh wife, they are joyntenants, and yet they come to their estates at severall times (13).

And so it is if I disseise one to the use of two, and the one agrees at one time, and the other at another, yet they are joyntenants.

In this Section are three, &c. The first and second are at large explained before; the last is intended where more parties take then three.

(9) See post. 214. a. and Bro. Abr. *joyntenants* 6.

(10) A like case of parceners is stated before, and resolved in the same way. Ant. 164. a. See further 19 H. 6. 45. b.

(11) For other cases, where *joint* words are construed to operate *severally* for the like

reason, see the arguments in Mr. Justice Windham's case, 5. Co. 7. a.

(12) It is in Dy. 339. b. pl. 48. but without any name. It is also much at large in 2 Leon. 14.

(13) [See Note 72.]

Vid. Lit. cap. Remitter the last case. (Post. 364. b.)  
10 H. 6. 10.  
31 H. 6. tit.  
Entire congeable.  
46 E. 3. 21. b.  
3 E. 4. 10.  
37 H. 6. 8.  
[w] 34 E. 8. 29.  
18 E. 3. 22.  
38 E. 3.  
(Cro. Jam. 259.)

[x] 17 El. Dyer  
Brent's case (13).

## (189. 13.) CHAP. 4. Of Tenants in Common. Sect. 292. [188. b.]

**T**ENANTS en Common sont ceux, que ont terres ou tenements en fee simple, fee taile, ou per terme de vie, &c. les queux ont tielx terres ou tenements per severall titles, et nemy per joint title, et nul de eux sçavoit de ceo son severall, mes ils doivent per la ley occuper tiels terres ou tenements en common, et pro indiviso a prendre les profits en common. Et pur ceo que ils avientront a tielx terres ou tenements per severall titles, et nemy per un joynt title, et leur occupation et possession sera per la ley perenler eux en common, ils sont apels tenants en common. Sicome un home enfeoff a deux joyntenants en fee, et l'un de eux alien ceo que a luy afferit a un autre en fee, ore le alienee et l'auter joyntenant sont tenants en common; pur ceo que ils sont eins en tiels tenements per severall titles, car l'alienee vient eins en la moitie per la feoffement d'un des joyntenants, et l'auter joyntenant ad l'auter moitie per force de la primer feoffment fait a luy et a son compaignon, &c. (1). Et issint ils sont eins per severall titles, c'est a savoir per severall feoffments, &c. (2).

**T**ENANTS in Common are they, which have lands or tenements in fee simple, fee taile, or for terme of life, &c. and they have such lands or tenements by severall titles, and not by a joynt title, and none of them know of this his severall, but they ought by the law to occupie these lands or tenements in common, and pro indiviso to take the profits in common. And because they come to such lands or tenements by severall titles, and not by one joynt title, and their occupation and possession shall be by law betweene them in common, they are called tenants in common. As if a man infeoffe two joyntenants in fee, and the one of them alien that which to him belongeth to another in fee, now the alienee and the other jointenant are tenants in common; because they are in such tenements by severall titles, for the alienee commeth to the moytie by the feoffment of one of the joyntenants, and the other joyntenant hath the other moitie by force of the first feoffment made to him and to his companion, &c. And so they are in by severall titles, that is to say, by severall feoffments, &c.

lib. 3. ca. 4.

**L**ITTLETON having spoken of parceners, which are onely by descent, and of joyntenants, which are onely by purchase and by joint title, speaketh now of tenants in common, which may be by three meanes, viz. by purchase, by descent, or by prescription, as hereafter in this Chapter shall appeare (3).

“Ou per terme de vie, &c.” Here &c. implyeth *pur terme d'auter vie*, or for tearm of yeares, or for any other [189. a.] fixed estate in the land.

And here it appeareth, that the essential difference betweene joyntenants and tenants in common is, that joyntenants have the lands by one joint title and in one right, (1) and tenants in common

(1) No &c. in L. and M. nor Roh.

(2) No &c. in L. and M. nor Roh.

(3) See Sect. 310. which gives an instance of tenancy in common by prescription.

[189. a.]

(1) See post. 299. b. the first line.

mon by severall titles, or by one title and by severall rights ; which is the reason, that joyntenants have one joint freehold, and tenants in common have severall freeholds. Onely this propertie is common to them both, viz. that their occupation is individed, and neither of them knoweth his part in severall.

The example that *Littleton* putteth in this Section is perspicuous, and needeth no explication.

*Vide Sect. 294.*

## Sect. 293.

(Ant. l. b.  
21, Ca. 58.)

**E***T est asçavoir, que quant il est dit en aucun livre que home est seisie en fee, sauns plus dire, il serra entendue en fee simple; car il ne serra entendue per tiel paroll (en fee) que home est seisie en fee taile, sinon que soit mis a ceo tiel addition, fee tayle, &c.*

**A**ND it is to bee understood, that when it is said in any booke that a man is seised in fee, without more saying, it shall bee intended in fee simple; for it shall not bee intended by this word (in fee) that a man is seised in fee tayle, unlesse there bee added to it this addition, fee tayle, &c.

**T**HIS is evident, and *secundum excellenciam* it shall be taken for the highest and best fee, and that is fee simple.

*Vide devent  
Sect. 99.  
(Ant. 73-4)*

"*Addition, fee tayle, &c.*" Here is implied a maxime in law, viz. that *additio probat minoritatem*, as it is vulgarly said, the younger sonne giveth the difference. (2)

## Sect. 294.

**I***TEM, si trois joyntenants sont, et un de eux alien ceo que a luy appartient a un auter home en fee, en cest cas l'alienee est tenant en common ovesque les auters deux joyntenants; mes uncore les auters deux joyntenants sont seisies des deux parts joyntment que remayne (3), et de ceux deux parts le survivor enter eux deux tient lieu, &c. (4)*

**A**LSO, if three joyntenants bee, and one of them alien that which to him belongeth to another man in fee, in this case the alienee is tenant in common with the other two joyntenants: but yet the other two joyntenants are seised of the two parts which remain joyntly (5), and of these two parts the survivor between them two holdeth place, &c.

**T**HIS needeth no explication, onely the *&c.* in the end of this Section implyeth, that the same law is where there be more joyntenants than three.

(2) The difference of arms is meant. See more particularly as to this ant. 140. b.

(3) *que remayne* not in L. & M. nor Rob.

(4) No *&c.* in L. and M. nor Rob.

(5) See Sect. 304. & 312.

Sect. 295.

[189. b.]

**I**TEM, si soient deux joyntenants en fee, et l'un dona ceo que a luy affiert a un auter en le tayle (1) [et l'auter done ceo que a luy affiert a un auter en le taile] les donees sont tenants en common, &c.

**A**LSO, if there bee two joyntenants in fee, and the one giveth that to him belongeth to another in tayle, and the other giveth that to him belongs to another in taile, the donees are tenants in common, &c.

Vide Sect 300.

**T**HE &c. in the end of this Section implyeth, that so it is when a lease for life or *pur auter vie* is made, for in that case also the lessees are tenants in common.

Sect. 296.

**M**ES si terres sont dones a deux homes, et a les heires de leur deux corps engendres, les donees vunt joint estate pur terme de leur vies; et si chescun de eux ad issue et dery, leur issues tiendront en common, &c. Mes si terres sont dones a deux abbes, sicome al abbe de Westminster et al abbe de S. Albon, a aver et tener a eux et a leur successors, en cest cas ils ont maintenant al commencement estate en common, et nemy joynt estate. Et le cause est, pur ceo que chescun abbe ou auter souveraigne de meason de religion, devant que il fuit fait abbe ou souveraigne, &c. il fuit forsque come mort person en ley, et quant il est fait abbe (2), il est come un home personable en ley tant seulement a purchaser et aver terres ou tenements ou auters choses al use de sa meuson, et nemy a son proper use, come auter seculer home poit, et pur ceo al commencement de leur purchase ils sont tenants en common; et si l'un de eux devie, l'abbe que survesquist n'avera my tout per le surrivour, mes le successor de l'abbe que morust tiendra le moitie en common ove l'abbe que survesquist, &c.

**B**UT if lands be given to two men, and to the heires of their two bodies begotten, the donees have a joynt estate for tearme of their lives; and if each of them hath issue and dye, their issues shall hold in common, &c. But if lands be given to two abbots, as to the abbot of Westminster, and to the abbot of Saint Albons, to have and to hold to them and to their successors, in this case they have presently at the beginning an estate in common, and not a joynt estate. And the reason is, for that every abbot or other souveraigne of a house of religion, before that hee was made abbot, or souveraign, &c. was but as a dead person in law, and when he is made abbot, he is as a man personable in law onely to purchase and have lands or tenements or other things to the use of his house, and not to his own proper use, as another secular man may, and therefore at the beginning of their purchase they are tenants in common; and if one of them die, the abbot which surviveth shall not have the whole by survivor, but

the successor of the abbot which is dead shall hold the moity in common with the abbot that surviveth, &c.

“SI

(1) The words between brackets not in L. and M. nor Roh.

(2) &c. in L. and M. and Roh.

"*SI terres sont dones a deux homes, &c.*" Of this sufficient hath been spoken in the Chapter [a] of Joyntenants.

[a] Sect. 286.  
(Aut. 182. a.)

"*Mes si terres sont dones a deux abbes, &c.*" In this case of the two abbots in respect of their several capacities, albeit the words bee joynt, yet the law [b] doth adjudge them to be severally seised (3).

(3 Saund. 319.)  
[b] 7 H. 7. 9. b.  
10 H. 7. 15. b.  
3 H. 7. 11.  
10 E. 4. 16. b.  
8 H. 7. 35.  
18 E. 3. 27. 40 E. 3. 26. b. (3 Re. Abr. 91. 2 Saund. 319.)

The &c. in the end of this Section. implyeth, that so it is, if any [c] body politique or corporate, be they regular as dead persons in law (whereof our author here speaketh) or secular: as if [190. a.] lands be given to two bishops, to have and to hold to them two and their successors: albeit the bishops were never any dead persons in law, but alwayes of capacite to take, yet seeing they take this purchase in their politique capacite, as bishops, they are presently tenants in common, because they are seised in severall rights, for the one bishop is seised in the right of his bishoprick of the one moitie, and the other is seised in the right of his bishoprick of the other moitie, and so by severall titles and in severall capacities, whereas joyntenants ought to have it in one and the same right and capacite, and by one and the same joynt title. The like law is, if lands be given to two parsons and their successors or to any other such like ecclesiasticall bodies politique or incorporate, as hath bin said.

Vide Sect. 306.

[c] 4 M. 7. 45.  
16 E. 3. 27. b.

If a corodie be granted to two men and their heires, in this case, because the corodie is incertaine and cannot be severed, it shall amount to a severall grant to each of them one corodie; for the persons be severall, and the corodie is personall. (1)

(5 Co. 2. a.  
Justice Wyndham's case.)

## Sect. 297.

*ITEM, si terres soient dones a un abbe et a un secular home, a aver et tener a eux, scil. al abbe et a ses successors, et al secular home a luy et a ses heires, donques ils ont estate en common, causa qua supra.*

ALSO, if lands bee given to an abbot and a secular man, to have and to hold to them, viz. to the abbot and his successors, and to the secular man to him and to his heires, they have an estate in common, *causa qua supra*.

AND so it is, if lands be given to the parson of *Dale* and to a lay man, to have and to hold to them, that is to say, to the parson and his successors, and to the lay man and his heires, they are presently tenants in common for the causes abovesaid. So of a bishop, &c. *Et sic de similibus.*

F. R. Ed. 49. 1.  
16 E. 3. Joindre en action 27.  
16 Ass. pl. 1.  
2 R. 3. 16.  
7 H. 7. 9.  
13 H. 8. 14.  
(5 Co. 2.)

If lands bee given to the king and to a subject, to have and to hold to them and to their heires, yet they are tenants in common, and not joyntenants; for the king is not seised in his naturall capacite, but in his royall and politique capacite, *in jure corone*, which

Pl. Com. in reig. Bartley's case.

(Aut. 16. a.)

[190. a.]

(3) [See Note 73.]

(1) [See Note 74.]

which cannot stand in joynture with the seisin of the subject in his naturall capacite. So likewise if there be two joyntenants, and the crowne descend to one of them, the joynture is severed, and they are become tenants in common. But if lands be given to *A. de B.* bishop of *N.* and to a secular man, to have and to hold to them two and to their heires, in this case they are joyntenants; for each of them take the lands in their naturall capacite.

If lands be given to *John* bishop of *Norwich* and his successors and to *John Overall* doctor of divinity and his heires, being one and the same person, he is tenant in common [d] with himselfe. But our author's rules doe not hold in chattels reals or personals; for if a lease for yeares be made or a ward granted to an abbot and a secular man, or to a bishop and a secular man, or if goods be granted to them, they are joyntenants, because they take not in their politique capacity. (2)

(Post. 310. b.  
2 Ro. Abr. 91.)  
[d] 13 H. 6. 14.  
16 H. 7. 16.  
9 H. 6. 25.  
44 E. 3. 23.

Sect. 298. (1) [190. b.]

**ITEM**, si terres soient dones a deux a aver et tener, scil. l'un moitie a l'un et a ses heires, et l'auter moity a l'auter et a ses heires, ils sont tenants en common.

**ALSO** if lands bee given to two to have and to hold, scil. the one moity to the one and to his heires, and the other moity to the other and to his heires, they are tenants in common.

(Cus. Cus. 75.  
Ant. 183. a. b.)

**AND** the reason is, because they have severall freeholds and an occupation *pro indiviso*.

Here is to bee observed, that the *habendum* doth sever the premises that *prima facie* seemed to be joynt; for an expresse estate controlls an implied estate as hath beene said.

(2 Ro. Abr. 99.  
50 Apr. 183. b.)

Sect. 299.

**ITEM**, si home seisie de certaine terres enfeoffa un auter de le moitie de mesme la terre sans aucun parlance de assignement ou limitation de mesme la moitie en severaltie al temps del feoffment, donques le feoffee et le feoffor tiendront lour parts de la terre en common.

**ALSO**, if a man seised of certaine lands infeoffe another of the moitie of the same land without any speech of assignement or limitation of the same moity in severaltie at the time of the feoffment, then the feoffee and the feoffor shall hold their parts of the land in common (2).

71 Am. pl. 18  
45 H. 2. 13.  
44 Apr. 11.

**AND** the like law is, if the feoffment bee made of a third part or a fourth part, &c. And if there be an advowson appendant, they are also tenants in common of the advowson. (3) And albeit

(2) [See Note 75.]

[190. b.]

(1) In L. and M. and Roh. this Section is placed immediately after Sect. 300.

(2) Brooke in his Abridgement title

*feoffments. de terres* pl. 75. cites this Section of Littleton, and in support of it refers to various cases in Fitzherbert's Abridgment. See further Bro. Nouv. Cas. 134. 134. 6. Co. 1. and Dy. 187. a. pl. 5.

(3) See post 307. a.



albeit it is said, that such a feoffment of a moitie or third part, &c. is not good without writing, for that (as they say) a man cannot create an uncertaine estate in land by parol; yet is the law cleere, that such a feoffment is good by parol without writing, and such an uncertaine estate shall passe by livery, and so it appeareth in our bookes.

If a verdict finde, that a man hath *duas partes manerii*, &c. in *tres partes divisas*, this shall not be intended to be in common; but if the verdict bee in *tres partes dividendas*, then it seemeth that they are tenants in common by the intendment of the verdict. (4)

But if a man be seised of a manor whereunto an advowson is appendant, and maketh a feoffment of three acres parcell of the manor together with the advowson of two, to have and to hold the one moiety together with the moitie of the advowson to the one and his heires, and the other moiety together with the other moiety of the advowson to the other and his heires, this cannot bee good without deed; for the feoffor cannot annex the advowson to these three acres, and disannex it from the rest of the manor, without deed. (5)

21 E. 4. 22. b.

31 H. 4. 22. b.  
3 E. 3. 23. 67.  
Tempe R. 1.  
Feoffments 115.  
34 E. 1. quar.  
impe. 179.  
10 Eliz. Dyer 28.  
23 E. 3. 6.  
Feoffments 116.  
6 E. 3. 20.  
39 E. 3. 39.  
9 E. 3. 16.  
17 E. 3. 3.  
18 E. 3. 43.  
43 E. 3. 28.  
23. Am. 8.  
33 H. 6. 5. a.  
(Post. 323. b.  
Cro. Cha. 433.  
Cro. Jam. 15.

## Sect. 300.

**E**T est asçavoir, que en mesme le maner come est avantdit de tenants en common, de terres ou tenements en fee simple, ou en fee taile, [191. a.] en mesme le maner poit estre de tenants a terme de  $\dagger$  vie. Sicome deux joyntenants sont en fee, et l'un lessa a un home ceo que a luy affiert pur terme de vie, et l'auter joyntenant lessa ceo que a luy affiert a un auter pur terme de vie, &c. les deux lessees sont tenants en common pur lour vies, &c.\*

**A**ND it is to bee understood, that in the same manner as is afore-said of tenants in common, of lands or tenements in fee simple, or in fee taile, in the same manner may it be of tenants for terme of life. As if two joyntenants bee in fee, and the one letteth to one man that which to him belongeth for terme of life, and the other joyntenant letteth that which to him belongeth to another for terme of life, &c. the said two lessees are tenants in common for their lives, &c.

Vid. Sect. 295. where this is sufficiently explained before.

## Sect. 301.

**I**TEM, si home lessa terres a deux homes pur terme de lour vies, & l'un granta tout son estate de ceo que a luy affiert a un auter, donques l'auter tenant a terme de vie, et  $\dagger$  celui a que le

**A**LSO if a man let lands to two men for terme of their lives, & the one grants all his estate of that which belongeth to him to another, then the other tenant for terme of life,

(4) [See Note 76.]

(5) Besides the references in the margin, see Dy. 48. b. pl. 3. and Dodoridge on Advowsons 30.

[191. a.]

$\dagger$  [At this page Mr. BUTLER's notes commence. See Note 77.]

\* &c. not in L. and M. or Roh.

$\dagger$  *Mesme* added L. and M. but not in Roh.

*le graunt est fait sont tenants en common, durant le temps que ambideux les lessees sont en vie.*

Et memorandum, que en tous et auters tiels cases, comant que ne sont icy expressement mores ou specifikes, si sont en semblable reason, sont en || semblable ley.

(7 Roll. Abr.  
89, 90. 1 Rep.  
84. b.)

80 Ass. 18.

(4 Rep. 78. b.  
3 Cro. 378. 417.  
606.)

(Foot. 305. a.  
Hob. 170. 306.)

AND so it is if lands bee letten to two for terme of their lives *et eorum alterius diutius viventi* (1), and one of them granteth his part to a stranger, whereby the joynture is severed, and dyeth, here shall bee no survivour, but the lessor shall enter into the moiety, and the survivour shall have no advantage of these words, *et eorum alterius diutius viventi*, for two causes. First, for that the joynture is severed. Secondly, for that those words are no more then the Common Law would have implied without them, and *expressio eorum quæ tacite insunt nihil operatur*. Hereby it appeareth that in case of leases for life it is more beneficiall for the lessor to have the joynture severed then to have it continue.

Vid. Sect. 1.

"*Si soient en semblable reason sont en semblable ley.*" Here Littleton citeth one of the Maximes of the Common Law. That wheresoever there is the like reason, there is the like law. *Ubi eadem ratio, ibi idem jus*; or *ubi eadem ratio, ibi idem jus esse debet*; for *ratio est anima legis*. And therefore *ratio potest allegari deficiente lege*. But it must be *ratio vera et legalis et non apparens*. And here it appeareth that *argumentum à simili* is good in law. *Sed similitudo legalis est casuum diversorum inter se collatorum similis ratio quod in uno similitum valet, valebit in altero, dissimilium dissimilis est ratio.*

## Sect. 302.

[191. b.]

**I**TEM \* si deux joyntenants en fee sont, et l'un lessa ceo que a luy affiert a un autre pur terme de sa vie, le tenant a terme de vie durant sa vie, et l'auter joyntenaunt que ne lessa pas, sont tenants en common. Et sur ceo case un question puit surder; † si come en tiel case mittomus que le lessor ad issue et devie vivant l'auter joyntenant son companion, et vivant le tenant a terme de vie, le question poet estre tiel: Si le reversion de la moitie † que le lessor avoit discedra al issue le

**A**LSO if there bee two joyntenants in fee, and the one letteth that to him belongeth to another for terme of his life, the tenant for terme of life during his life, and the other jointenant which did not let, are tenants in common. And upon this case a question may arise; as in such case admit that the lessor hath issue and die, living the other joyntenant his companion, and living the tenant for life, the question may be this, Whether the reversion of the moiety which

† les added in L. and M. but not in Roh.

† semble L. and M. and Roh.

(1) [See Note 78.]

[191. b.

\* si deux not in Roh. but in L. and M.

† si not in L. and M. or Roh.

† &c. added in L. and M. and Roh.

le lessor, ou que l'auter joyntenant avera || cel reversion per le survivoor ?  
*Ascuns ont dit en cest case, que l'auter joyntenant avera cel reversion per le survivoor : et lour reason est tiel, scilicet que quant les joyntenants fueront joyntment seisis en fee simple, &c. coment que l'un de eux fist estate de ceo que a luy affiert pur terme de ¶ sa vie, et coment que il ad sever le franktenement de ceo que a luy affiert per le lease, uncore il n'ad sever le fee simple, mes le fee simple demurt a eux joyntment come il fuyt adevant. Et issint semble a eux, que l'auter joyntenant que survesquist, avera le reversion per le survivoor, &c. Et auters ont dit le contrarie, & ceo est lour reason, scilicet, que quant l'un des joyntenants lessa ceo que a luy affiert a un auter pur terme de sa vie, per tiel lease le franktenement est sever de le joynture. Et per mesme le reason le reversion que est dependant sur mesme le franktenement, est sever de le joynture. Auxy si le lessour ust reserve a luy un annuall rent sur le leas, le lessor solement averoit le rent, &c. le quel est un prooffe que le reversion est solement en luy, et que l'auter n'ad riens en cel reversion, &c. Auxy si le tenant a term de vie fuit impleade, &c. & fist default apres default, donques le lessor serroit de ceo solement receive a defender son droit, et son compaignon en cest case en nul manner serroit receive, le quel prove\* le reversion del moity d'estre tant solement en le lessor : et sic per consequens, si le lessour morust vivant le lessee per terme de vie, le reversion descendra al heire de lessour, et nemy deviendra a l'auter joyntenant per le survivoor, Ideo quære. Mes en cest case si celui joyntenant que ad le franktenement ad issue et devie, vivant le lessor & lessee, donques il semble, que mesme l'issue avera cest moitie*

which the lessor hath shall descend to the issue of the lessor, or that the other jointenant shall have this reversion by the survivor? Some have said in this case, that the other jointenant shall have this reversion by the survivor; and their reason is this, *scil.* That when the jointenants were jointly seised in fee simple, &c. although that the one of them make an estate of that to him belongeth for term of his life, and although that hee hath severed the freehold of this which to him belongs by the lease, yet he hath not severed the fee simple, but the fee simple remains to them jointly as it was before. And so it seemeth to them, that the other jointenant which surviveth shall have the reversion by the survivor, &c. And others have said the contrary, and this is their reason, *scilicet*, That when one of the jointenants leaseth that to him belongeth, to another for terme of his life, by such lease the freehold is severed from the joynture. And by the same reason the reversion which is depending upon the same freehold is severed from the joynture. Also if the lessor had reserved to him an annual rent upon the lease, the lessor onely should have had the rent, &c. the which is a prooffe, that the reversion is onely in him, and that the other hath nothing in the reversion, &c. Also if the tenant for terme of life were impleaded, & maketh default after default, the lessor shall be only received for this, to defend his right, and his companion in this case in no manner shall be received, the which proveth the reversion of the moitie to be onely in the lessor: and so by consequent, if the lessour dieth living the lessee for terme of life, the reversion shall descend to the heir

¶ cel reversion, ceo in L. and M. and Roh.  
 \* que added in L. and M. and Roh.

¶ sa not in L. and M. or Roh.  
 \* que added in L. and M. and Roh.

*tie en demesne, et en fee per discent, pur ceo que \* un franktenement ne poet per nature de joynture estre annexé a un reversion, &c. Et il est certaine, que celui que lessa fuit seisié de le moitie en son demesne come de fee, et nul avera ascun joynture en son franktenement. Ergo ceo discendra a son issue, &c. Sed quære.*

heir of the lessour, and shall not come to the other joyntenant by the survivor, *Ideo quære.* But in this case if that jointenant which hath the freehold hath issue, & dies living the lessor and the lessee, then it seemeth that the same issue shall have this moiety in demesne, and in fee by descent, for that a freehold cannot by nature of joynture bee annexed to a reversion, &c. And it is certaine, that hee which leased was seised of the moiety in his demesne as of fee, and none shall have any joynture in his freehold, therefore this shall descend to his issue, &c. *Sed quære.*

“ *S* *I deux joyntenants en fee, &c.*”  
This needeth no explanation.

Við. 33 H. 6. 4. b.

[a] Viðe Sect.  
340. 378. 439,  
460. 462. 463,  
464. 482. 483.  
648. 730. 739.  
Við. Sect. 170.

Við. Sect. 8.  
7 H. 6.  
(Ant. 15. a.)

“ *Et sur ceo case un question poet surder, &c.*”

Here Littleton maketh a question, and sheweth the reasons on both sides, and concludes with a Quære. When Littleton maketh a question, and sheweth the reason on both sides, the latter is ever his owne, [a] and the better. But time hath made this question without question; for now all agree, that the joynture is severed for the time, according to the latter opinion here set downe in Littleton, whose reasons are unanswerable: for many times the change of the freehold makes an alteration or change of the reversion. As if tenant in taile, or the husband seised in the right of his wife, or tenant for life, make a lease for life of the lessee, in everie of these cases the lessour doth gaine a new reversion by wrong, as shall be said more at large in the chapter of Discontinuance; and if the elder brother grant the reversion (expectant upon a freehold) for life, it shall cause *possessio fratris*, as hath beene sayd.

“ *Per mesme le reason le reversion que est dependant sur mesme le franktenement est sever de le joynture, &c.*”

7 H. 7. 9.

(Ant. 189. b.)

If two joyntenants in fee be, and they both joyne in a lease to an abbot and a secular man for term of their lives, here the reversion that is dependant upon severall freeholds is severed. And so it is if they joine in a lease to two secular men, to have and to hold the one moiety to the one for life, and the other moiety to the other for life, for both these cases are warranted by [192. a.] the authority of *Littleton*.

(Post. Sect. 319.  
199. a.)

\* Hil. 10 Edw.

If two joyntenants be of a lease for twenty one years, and the one of them letteth his part for certaine yeares, part of the terme, the joynture is severed, and survivor holdeth not place, for a terme for a small number of yeares is as high an interest as for many more years; and so was it resolved *Hil. 18 El. Reginae, in Comuni Banco*, \* which I myselfe heard.

(Ant. 167. a.)

If two coparceners be in fee, and the one make a lease for life, this is no severance of the coparcenary, for notwithstanding the lord shall make one avowrie upon them both.

But if two joyntenants be, and one maketh a lease for life, this is a severance of the joynture, as *Littleton* here taketh it, and severall avowries shall be made upon them. (1)

“ *Auxy*

\* *un* not in L. and M. or Rob.

(1) [See Note 79.]

"Auxy si le lessor ust reserve un annual rent, le lessor solement avera le rent, &c." But if two joyntenants make a lease for life, reserving a rent to one of them, the rent shall enure to them both, because the reversion remains in jointure, unless the reservation be by deed indented, and then he onely to whom it is reserved shall have it. But if they make a lease by deed indented, reserving or saving the reversion to one of them, that is void, because they had the reversion before, but the rent is newly created.

5 H. 4. 4. 2.  
27 H. 8. 16. 2.  
7 E. 4. 25.  
14 Ed. 3. Br. 282.  
(Ant. 47. a.)  
(Post. 214. a.)

And so it is if such a lessee for life should surrender to one of them, it shall enure to them both, for that they have a joynt reversion. But if the lessee grant his estate to one of them, no part of it shall enure to his companion, because for the moiety belonging to his companion, it is in *esse* in him to whom the grant is made, the reversion to the other in fee.

5 H. 4. 4.  
(2. Rep. 66.  
Post. 214. a.)

(2. Cro. 611.  
Perk. 31.)

38 H. 6. 24. b.  
2 R. 2. tit. Ex-  
tinguishment 2.  
(4. Lec. 187.)

[192. b.] If two joyntenants make a lease for life, the remainder to his companion in fee, this is a good remainder of his moitie to his companion.

"Donques le feoffor serrra de ceo solement receive, &c."

"Receive," *Recet*, *Receptio*, is in many cases where a person, partie to a writ, or an estranger thereunto, to whom a reversion or remainder appertaineth, shall in default of another person be received to defend his or her freehold or inheritance, the law saith, *Admittatur, &c.* And this admission or receipt is given by sundry statutes [f] (and this is that which the civilians call, *Admissio tertie persone pro interesse*). *Et in casibus predictis due concurrunt actiones: una inter petentem & tenentem, & alia inter tenentem, ius suum ostendentem & petentem.*

(Post. 352. b.)

[f] W. 2. cap. 3.  
20 E. 1. Statute  
de defensione  
Juris. 13 R. 2.  
cap. 16.

"Pur ceo que un franktenement ne poet fier nature de joynture, estre annexe a un reversion." And this is the principall reason, and of this sufficient hath beene said in the chapter of Joyntenants, Sect. 291.

"&c." This &c. in the end of this section, implieth any other heir lineal or collaterall.

[193. a.]

Sect. 303.

**M**ES si issint soit quela ley en cest cas est tiel, que si le lessor devie vivant le lessee, et vivant l'auter joyntenant que ad le franktenement de l'auter moitie, que le reversion descendra al issue del lessor, donque est le joynture et tittle que aucun de eux poit aver per le survivor, et le droit de le joynture anient, et tout ousterment defeat a tous jours. En mcsme le maner est, si celui joyntenant que ad le franktenement devie vivant le lessor et

**B**UT if it be so that the law in this case bee such, that if the lessor die living the lessee, and living the other joyntenant which hath the freehold of the other moiety, that the reversion shall descend to the issue of the lessor, then is the joynture and tittle which any of them may have by the survivor, and the right of the joynture taken away, and altogether defeated for ever. In the same manner it is, if that

joynt-

*et le lesee, si la ley soit tiel que son franktenement et fee que il ad en le moitie descendra a son issue, donques le joynture serra defeat a tous jours.*

joyntenant which hath the freehold dye living the lessor and the lessee, if the law bee so as his freehold and fee which he hath in the moity shall descend to his issue, then the joynture shall be defeated for ever.

"**D**ONQUES est le joynture et tittle, &c. et le droit de le joynture anient, &c."

[\*] Vide Sect. 291.  
(Foot. 314. a.)

And the reason of this is, for if the joynture be severed at the time of the death of him that first deceased, the benefit of the survivor is utterly destroyed for ever, as hath beene said [\*] afore in the Chapter of Joyntenants. But in the case aforesaid, if tenant for life dyeth in the life of both the joyntenants, they are joyntenants againe as they were before.

If two joyntenants be in fee, and the one letteth his part to another for the life of the lessor, and the lessor dieth, some say that his part shal survive to his companion, for by his death the lease was determined. And others hold the contrary; and their reason is, first, for that at the time of his death the joynture was severed, for so long as he lived the lease continued. And secondly, that notwithstanding the act of any one of the joyntenants there must bee equall benefit of survivor as to the freehold. But here if the other joyntenant had first died, there had been no benefit of survivor to the lesser without question.

## Sect. 304.

**I**TEM, si trois joyntenants sont, et l'un relessa per son fait a un de ses companions tout le droit que il avoit en le terre, donques ad celui a que le releas est fait, le tierce part de les terres per force de le dit releas, et il et son companion teigneront les autres deux parts \* en joynture. Et quant al tierce part, que il ad per force de releas, il tient cel tierce part ave luy meisme et son companion en common.

**A**ND, if three joyntenants be, and the one release by his deed to one of his companions all the right which he hath in the land (1), then hath he to whom the release is made, the third part of the lands by force of the said release, and he and his companion shall hold the other two parts in joynture. And as to the third part, which he hath by force of the release, he holdeth that third part with himselfe and his companion in common.

(Foot. 318. a.  
& Rep. 78. b.  
Ant. 135. a.)  
[\*] 9 Edw.  
Dyer 263.  
16 E. 6. 17.

[a] 40 E. 3. 41.  
35 E. 6. tit. Gart.  
35 E. 3. release  
42. 39 E. 6. 42.  
14 E. 3. Briche 23.  
39 E. 6. 17.  
33 E. 6. 6.  
39 E. 6. 2. 37 E. 6.  
Admoum 32.  
3 E. 6. 6.  
40 E. 6. 3.

**U**PON this case these two things are to be observed. First, that in this case this release doth enure by way of *mitter l'estate*, and not [\*] by way of extinguishment, for then the release should enure to his companion also, and he is in the *per* by him that maketh the release. [a] But if hee had released to the other two, then had it wrought no degree but in supposition of law, for many purposes they to whom the release is made [193. b.] (as hath beene said) shall bee supposed in from the first feoffor, as they

\* en jointure—jointment, in L. and M. and Boh. (1) [See Note 80.]

they shall deraigne the first warrantie for the whole. [b] The second thing to bee observed is, that he to whom the release is made hath a fee simple without this word (heires), as hath beene touched in the first chapter of the first booke, for that he to whom the release is, is seised *per my et per tout*, of the fee and inheritance, as hath been said in the Chapter of Joyntenants. And note, the like law is betweene coparceners: and further, if there be two coparceners, and the one hath issue twentie daughters and dieth, the other may release to any one of the daughters, her whole part, albeit she to whom the release is, hath not an equall part; but for the privitie and the individued estate, the release is good.

But if two joyntenants be of twenty acres, and the one maketh a feoffment of his part in eightene acres, the other cannot release his entire part, but only in two acres, for that the joynture is severed for the residue.

(Post. 385. a.)  
[b] 9 Eliz.  
Dyer 263.  
19 H. 6. 17.  
(Ante 9. h.)

## Sect. 305.

**ET** est asavoir, que aucun foist un releas prendra effect, et urera pur mitter l'estate de celui que fist le releas a celui a que le releas est fait, sicome en le cas avant dit, et auxy, sicome j'oynt estate soit fait a le baron et sa feme, et a la tierce person, et la tierce person releassa tout son droit que il ad a le baron, adonque ad le baron la moitie que le tierce avoit, et la feme de ceo n'ad riens. Et si en tiel case le tierce releassa a la feme nient nosmant le baron en le release, donques ad la feme le moitie que le tierce avoit, &c. et le baron n'ad riens de ceo forsque en droit sa feme, pur ceo que en tiel case le release urera de faire estate a celui a que le release est fait, de tout ceo que affiert a celui que fait le release, &c.

**AND** it is to be observed, that sometimes a deed of release shal take effect, and enure to put the estate of him which makes the release to him to whom the release is made, as in the case aforesaid, and also, as if a joynt estate bee made to the husband and wife, and of a third person, and the third person release all his right which hee hath to the husband, then hath the husband the moitie which the third had, and the wife hath nothing of this. And if in such case the third release to the wife not naming the husband in the release, then hath the wife the moitie which the third had, &c. and the husband hath nothing of this but in right of his wife, because that in this case the release shal enure to make an estate to whom the release is made, of all that which belongeth to him which maketh the release, &c.

**THIS** is evident upon that which hath beene said before.

[c] And it is to bee understood, that a release may enure foure manner of wayes. First, by way of *mitter l'estate*, as here it appeareth. Secondly, by way of *mitter le droit*. Thirdly, by way of extinguishment. Fourthly, by way of creation or enlargement of an estate, as hereafter in this Chapter shall appeare. And it is to bee observed, that upon a release that creates or enlargeth an estate, or enures by way of *mitter l'estate*, a rent may bee reserved, but

[c] 10 Eliz.  
Bendloca.  
9 Eliz. Dier 263.  
(3 Roll. Abr. 403.)  
See more of this in  
the Chapter of  
Releases.  
(Post. 373. b.)  
10 E. 4. 8. b.  
21 H. 6. 2. b.  
(Ant. 144. a.)

† *en fait et*, added in L. and M. and Rob.  
‡ *que* added in L. and M.

‡ *&c.* added in L. and M. and Rob.  
§ *&c.* added in L. and M. and Rob.

but not upon a release that enureth by way of *mitter le droit*, or which enures by way of extinguishment.

The (*Ec.*) in the end of this Section implieth a diversitie [194. a.] between a release which enures by way of *mitter l'estate* (whereof *Littleton* here speaketh) and a release that enures by way of extinguishment: for of a release enuring by way of extinguishment made to the husband, the wife shall take benefit, or to the wife, the husband shall take benefit, as hereafter shall more at large be said.

## Sect. 306.

**E**T en aucun cas un releas urera de mitter tout le droit que il que fait le releas ad a celui a que le releas est fait. Sicome home seisie de certain tenements est disseisiné par deux disseisors, si le disseisee par son fait releasa tout son droit, *Ec.* a un des disseisors donque celui a que le releas est fait, avra et tiendra tous les tenements a luy solement, et oustera son companion de chescun occupation de ceo. Et le cause est, pur ceo que les deux disseisors fueront eins \* encounter la ley, et quant un de eux happe le releas de celui que ad droit d'entre, *Ec.* cest droit en tiel cas † vestera en celui a que le releas est fait, et est en tiel plyte, sicome ‡ il que avoit droit || avoit enter, et luy enfeoffa, *Ec.* Et la cause est, pur ceo que il que avoit advoant estate per tort, scilicet, per disseisin, *Ec.* ad ore per le releas un estate droiturel. §

**A**ND in some case a release shal enure to put all the right which he who maketh the release hath to him to whom the release is made. As if a man seised of certaine tenements is disseised by two disseisors, if the disseisee by his deed release all his right, &c. to one of the disseisors, then hee to whom the release is made, shall have and hold al the tenements to him alone, and shal oust his companion of every occupation of this. And the reason is, for that the two disseisors were in against the law, and when one of them happeth the release of him which hath right of entry, &c. this right in such case shall vest in him to whom the release is made, and he is in like plite, as hee which hath the right had entered and enfeoffed him, &c. And the reason is, for that he which before had an estate by wrong, *scilicet*, by disseisin, &c. hath now by the release a rightful estate.

(R. Roll. Abr. 409.  
414. Post. 376. a.)

**H**ERE *Littleton* pursueth the second part of his division, viz. where a release shall enure by way of *mitter le droit*.

"*Disseisiné per deux disseisors, Ec.*" The like law is, where there bee two joynt abators or intruders which come in meere by wrong. But if two men doe usurpe by a wrongfull presentation to a church, and there clarke is admitted, instituted and inducted, and the rightfull patron releaseth to one of them, this shall enure to them both, for that the usurpers come not in meere by wrong, but their clarke is in by admission, and institution, which are judiciall acts.

\* see tenements per tort, per eux fait, added in L. and. M. and Roh.

† vestera—vest in L. and M. and Roh.

‡ it—oil in L. and M. and Roh.

§ *Ec.* added: avoit enter, et, not in L. and M. nor Roh.

§ *Ec.* added in L. and M. and Roh.



acts. [d] And therefore an usurpation shal worke a *remitter* to one that hath a former right.

[d] Fitz. N. B. 35 in 11 R. 2. quar. Imp. 144. (1 Roll. Abr. 661, 662. Post. 368. a. Ant. 180. b. 181. a.)

"*Donques celui a que le release est fait avera et teignera tous les tenements, &c.*" Here by operation of law presently upon the deliverie of the release the whole freehold and inheritance is vested in him to whom the release is made, and al the state that the other disseisor had, wholly devested: for right and wrong cannot consist together, but the wrongfull estate giveth place to the rightfull. And the reason hereof is for that, as hath been said, the disseisor to [194. b.] whom the release was made was seised *per my et per tout*, whereunto when the right commeth it excludeth the wrong [e]; for right which is lawfull, and wrong that is contrary to law, cannot stand together.

[e] Brit. fol. 116. 26 Am. pl. 39. 39 E. 3. 39. 21 H. 6. 41. 22 H. 6. 22. 7 E. 4. 25. 9 E. 4. 6. 11 H. 7. 13. 20 H. 7. 5. 21 H. 7. 12. 12 E. 4. tit. Discontin. l. 9 H. 6. 37. 21 H. 6. 32.

"*En tiel plite, sicome il que avoit droit avoit enter, et luy enfeoffa, &c.*" This (*&c.*) doth implice that this is true *secundum quid* (1), but not *simplicitèr* (2); for as to the holding out of the joynt disseisor, it amounts to as much as if he had entered and infeoffed him to whom the release is made, but it doth not amount to an entrie and and feoffment *simplicitèr* to all purposes, as shall be said hereafter in his proper place in the Chapter of Releases.

Sect. 307.

**E**T en ascun cas un releas urera *per voy d'extinguishment*, et en tiel case tiel releas aydera le joyntenant a que le release ne fuit fait, auxy bien come † luy a que le release fuit fait. Sicome ‡ un home soit disseisie, et le disseisor fait feoffment a deux homes en fee, § si ‖ le disseisee releassa per son fait a un de les feoffees, donques ¶ cel release urera a umbideux les feoffees, pur ceo que les feoffees ont estate per la ley, scilicet, per feoffment, et nemy per tort fait a nulluy, &c. (3)

**A**ND in some case a release shall inure by way of extinguishment, and in such case such release shall aide the joyntenant to whom the release was not made, as well as him to whom the release was made. As if a man be disseised, and the disseisor makes a feoffment to two men in fee, if the disseisee release by his deed to one of the feoffees. this release shal enure to both the feoffees, for that the feoffees have an estate by the law, *scilicet*, by feoffment, and not by wrong done to any, &c.

**H**ERE Littleton speaketh of the third kind of releases. And the reason of this diversitie (implied in the (*&c.*) in the end of this Section) between the disseisors and their feoffees, is for that the feoffees comming in by title and purchase, are intended in law to have a warrantie (which is much esteemed in law); and therefore

† luy—a celui in L. and M. and Roh.

‡ si added in L. and M. but not in Roh.

§ si not in L. and M. nor Roh.

¶ et added in L. and M. and Roh.

¶ cel—tiel in L. and M. and Roh.

(1) i. e. in some respects ;—as to some persons.

(2) i. e. absolutely.

(3) [See Note 81.]

[f] 4 R. 3.  
Ass. 432. 1 Ass.  
13. 9 Ass. 16. 21.  
21 Ass. 22.  
27 Ass. 68. 30.  
29 Ass. 54.  
43 Ass. 17.  
40 E. 3. 24.  
50 E. 3. 21.  
3 R. 2. entry  
comm. 38.  
13 E. 3. tit. Ass. 9.  
12 Ass. 20.

fore lest the warrantie should be avoided, the release shall enure to both the feoffees in favour of purchasers, and so the right and benefit of every one saved. [f] And in antient time if the disseisor had made a feoffment in fee, or a gift in taile, or a lease for life, and the feoffee, donee, or lessee had continued in seisin quietly a yeare and a day, the entrie of the disseisee had not been lawfull upon him; and the reason was, for the benefit and safeguard of the warranty (which was intended by law) should have been destroyed by the entrie. But hereof also more shall be said in his proper place in the Chapter of Releases.

(9 Roll. Abr.  
400.)

Sect. 308.

**E**N mesme le maner est, si le disseisor fait un lease a un home per terme de sa vie, le remainder ouster a un autre en fee, si le disseisee release a le tenant a terme de vie tout son droit, &c. cel release urera auxy-bien a celuy en le remainder, come a le tenant a terme de vie. Et la cause est, pur ceo que le tenant a terme de vie vient a son estate per course de ley, et pur ceo cel release urera et prent effect per voy d'extinguishment de droit de celuy que release, &c. Et per cel release le tenant a terme de vie n'ad plus ample ne greinder estate que il avoit dunt le release fait a luy, et le droit celuy que release est tout ousterment extinct. Et entant que cest release ne poit enlarge l'estate de le tenant a terme de vie, il est reason que cel release urera a celuy en le remainder, &c.

Plus serra dit de releases en le  
Chapiter de releases.

**I**N the same manner it is, if the disseisor maketh a lease to a man for terme of his life, the remainder over to another in fee, if the disseisee release to the tenant for terme of life all his right, &c. this release shall inure as well to him in the remainder, as to the tenant for terme of life. And the reason is, for that the tenant for life commeth to his estate by course of law, and therefore this release shall enure and take effect by way of extinguishment of the right of him which releaseth, &c. And by this release the tenant for life hath no ampler nor greater estate than hee had before the release made him, and the right of him which releaseth is altogether extinct. And inasmuch as this release cannot enlarge the estate of the tenant for life, it is reason that this release shal enure to him in the remainder, &c.

More shall be said of releases in the Chapter of Releases.

**C**EST release urera auxy-bien a celuy en le remainder, come a le tenant a terme de vie, &c." Of this and the rest of this Section, for avoyding of repetition, more shall be said in his proper place in the Chapter of Releases.

"*Tout son droit, &c.*" Here by this (&c.) is implied, title, demand, and other words which may transferre the right, &c. Also here is implied of in or to the land.

## Sect. 309.

**I**TEM, si soient deux parceners, et l'un alien eeo que a luy affect a un auter, donques l'auter, parcener et l'alienee sont tenants en common.

**A**LSO, if two parceners, be, and the one alieneth that to her belongeth to another, then the other parcener and the alienee are tenants in common.

This evident, and needeth no explication.

## Sect. 310.

(Ant. 114. a.)

**I**TEM, \* nota, que tenants en common poient estre per † title de prescription, sicome l'un et ses aunces-  
[197. b.] tors, ou ceux que estate il ad en un moity ont tenus en common mesme le moitie ove l'auter tenant que ad l'auter moitie, et ove ses auncestors, ou ove ceux que estate il ad per indiviso ‡, de temps dont memory ne court, &c. Et divers auters manners poient faire et causer homes d'estre tenants en common, que ne sont icy expresses, § &c.

**A**LSO, note, that tenants in common may bee by title of prescription, as if the one and his ancestors or they whose estate hee hath in one moity have holden in common the same moitie with the other tenant which hath the other moity, and with his ancestors, or with those whose state he hath undivided, time out of minde of man. And divers other manners may make and cause men to be tenants in common, which are not here exprest, &c. (1).

**O**F this, besides *Littleton*, there is as good authoritie in law, as there is for all his other cases throughout his three bookes; but joyntenants cannot be by prescription, because there is survivor betweene them, but not betweene tenants in common.

11 E. 3. Trans.  
212. 13 E. 4.  
Brick 674.  
3 H. 6. 16. b.  
lib. intrat. 23.

The two (&c.) in this Section are evident.

## Sect. 311.

**I**TEM, en ascun cas tenants en common doyent aver de leur possession severall actions, et en ascun cas ils joyndront en un action. Car si sont deux tenants en common, et ils sont

**A**LSO, in some case tenants in common ought to have of their possession severall actions, and in some cases they shall joyne in one action.  
(2) For if two tenants in common be

\* nota que not in L. and M. nor Roh.

† title de not in Roh.

‡ &c. added in Roh.

§ &c. not in Roh.

(1) [See Note 82.]

(2) The reader will find what *Littleton* and his commentator say on this subject confirmed and exemplified by the cases cited in *Viner* and *Bacon's Abridgments*, and *Comyn's Digest*, under the proper Titles.

*sont disseisies, ils doyent aver † deux assises, et nemy un assise; car chescun de eux covient aver un assise de son moitie, &c. Et la cause est, pur ceo que tenants en common fueront seisies, &c. per severallx titles. Mes autrement est de joyntenants; car si soyent vint joyntenants, et ils sont disseisies, ils averont en tous lour nosmes forsque un assise, pur ceo que ils n'ont forsque un joynt title.*

be, and they be disseised, they must have two assises, and not one assise; for each of them ought to have one assise of his moitie, &c. And the reason is, for that the tenants in common were seised, &c. by severall titles. But otherwise it is of jointenants; for if twenty jointenants be, and they bee disseised, they shall have in al their names but one assise, because they have not but one joynt title.

(Post. 200. Cro.  
Jac. 831.  
Noy 13. Post.  
Lit. Sect. 314.)

4 E. 4. 18. b.  
(Ant. 100. b.)

**I**N this Section wee learne two things; first, that in reall actions, and in actions also that are mixt with the personalty, tenants in common shal sever in action, because they have several freeholds, and claime in by severall titles; and therefore as they shall bee severally by others impleaded, so shall they severally implead others in al real and mixt actions, unlesse it be in case of necessity for a thing entire, as hereafter in this Chapter shall appeare. And *Littleton* here putteth the case of the assise which is mixt with the personaltie, and therefore hee needeth not to put any case of any *precipe quod reddat*; for if it bee so in case of assise, *a fortiori* in writs of higher nature, which is necessarily implied in the (*&c.*) Now of suits that sound in the realty, and of personall actions, *Littleton* speaketh hereafter in this Chapter. The second thing here to bee learned, is the diversitie betweene tenants in common and joyntenants, which both of itselfe, and upon that which hath been said, is apparent.

(Noy 13. Ant.  
183.)

## Sect. 312.

[196. a.]

**I**TEM, si soient trois joyntenants, et un release a un de ses companions tout le droit que il ad, &c. et puis les \* autres deux sont disseisies de l'entiertie, &c. en cest case les deux autres averont † severallx assises, &c. en cest forme, scilicet, ils averont en lour ambideux nosmes un assise de les deux parts, &c. pur ceo que les deux parts ils teignent jointment al temps de le disseisin. Et quant a le tierce part, celuy a que le release fuit fait, covient aver de ceo un assise en son nosme demesne, pur ceo que † il (quant a mesme le tierce part) est de ceo tenant, in

**A**LSO, if three joyntenants bee, and one release to one of his fellows all the right which hee hath, &c. and after the other two be disseised of the whole, &c. in this case the two others shall have severall assises, &c. in this manner, viz. they shall have in both their names an assise of the two parts, &c. because the two parts they held jointly at the time of the disseisin. And as to the third part, he to whom the release was made, ought to have of that an assise in his own name, for that bee (as to the same third part) is thereof tenant

† envers le disseisor added in Roh.  
\* autres not in Roh.

† &c. added in Roh.  
† il not in Roh.

*in common, &c. pur ceo que il vient a cel || tierce part per force del release, et nemy tantsolement per force del joynture.*

tenant in common, &c. because hee commeth to this third part by force of the release, and not only by force of the joynture.

This is put for an example (which ever doth illustrate the rule) and is evident of itself, and the (&c.) in this Section needeth no further explication.

## Sect. 313.

(Ant. 164. a.)  
(7. Rep. 86. b.)

**I**TEM, quant a suer des actions que touchant § le realty, y sont diversities perenter parceners que sont eins per divers discent, et tenaunts en common. Car si ¶ home seisie de certaine terre en fee ad issue deux \*\* files ¶ et morust, et les files entront, &c. et chescun de eux ad issue un fts, et devieront sauns partition fait enter eux, per que l'un moily descendist a le fts d'un parcener, et l'auter moilie descendist al fts d'auter parcener, et ils entront et occupiont en common et sont disseisies, en cest case ils averont en lour deux nosmes un assise, et nemy deux assises. Et la cause est, que coment que ils veignent eins per divers discent, &c. uncore ils sont parceners et brieft de partitione faciendā gist enter eux. Et ils ne sont parceners, eyant regarde ou respect tantsolement a \* le seisin et possession de lour meres, mes ils sont parceners puis, eyant respect a l'estate que descendist de lour ayeul a lour meres, car ils ne poyent estre parceners si lour meres ne fueront parceners adevant, † &c. Et issint a tiel respect et consideration, scilicet, quant a le primer discent que fuit a lour meres, ils ont un titre en parcenarie, le quel fait eux parceners. Et auxy ils ne sont forsque come un heire a lour common uncestor, scilicet, a lour ayeul, de que la terre descendist a lour

**A**LSO, to the suing of actions which touch the realty, there bee diversities betweene parceners which are in by divers descents, and tenants in common. For if a man seised of certain land in fee hath issue two daughters and dyeth, and the daughters enter, &c. and each of them hath issue a sonne, and die without partition made between them, by which the one moiety descends to the sonne of the one parcener, and the other moiety descends to the sonne of the other parcener, and they enter and occupie in common and bee disseised, in this case they shall have in their two names one assise, and not two assises. And the cause is, for that albeit they come in by divers descents, &c. yet they are parceners, and a writ of partition lieth betweene them. And they are not parceners, having regard or respect onely to the seisin and possession of their mothers, but they are parceners rather, having respect to the estate which descended from their grandfather to their mothers, for they cannot bee parceners if their mothers were not parceners before, &c. And so in this respect and consideration, viz. as to the first descent which was to their mothers, they have a title in parcenarie, the which makes them parceners.

¶ tierces not in Rob.

§ on added in Rob.

¶ home—deux parceners in Rob.

\*\* files—files in Rob.

¶ est morust, et les files entront, &c. et chescun de eux ad issue un fts, not in Rob.

\* le—lour in Rob.

† &c. not in Rob.

*leur meres. Et pur ceuz causes devant partition enter eux, &c. ils averont un assise, coment que ils veignent cins per severallx discentz.*

And for these causes, before partition between them, &c. they shall have an assise, although they come in by severall discentz.

(Ant. 104. a.)  
Viz. Sect. 341.

This, upon that which hath beene said in the Chapter of Parceners, is evident: where you may reade excellent points of learning, and diversities concerning this matter; all which are here either expressed or implied, as the studious and diligent reader will observe.

## Sect. 314.

**I**TEM, si sont deux tenants en common de certaine terre en fee, et ils donneront cel terre a un home en le taile, ou lesseront a un home pur terme de vie, rendant a eux annuellement un certaine rent, et un liver de pepper, et un espervier ou un chival, et ils sont seisis de cest service, et puis tout le rent est aderere, et ils distraigneront pur ceo, et le tenant a eux fait rescous. En cest cas quant a le rent et liver de pepper ils ateront deux assises, et quant a l'espervier ou le chival forsque un assise. Et la cause pur que ils averont deux assises quant a le rent et liver de pepper est ceo, entant que ils fueront tenants en common en severall titles, et quant ils fieront un done en le tayle ou leas pur terme de vie, savant a eux le reversion, et rendant a eux certaine rent, &c. tiel reservation est incident a lour reversion; et pur ceo que lour reversion est en common, et per severall titles, sicome lour possession fuit devant le rent et auter choses que poient estre severes, et fueront a eux reserves sur le done, ou sur le leas, queux son incidents per le ley a lour reversion, tiels choses issint reserves fueront de la nature del reversion. Et entant que le reversion est a eux en common per severall titles, il sovient que le rent et le liver de pepper, queux poient estre severs, soyent a eux en common, et per severall titles.

Et

**A**ISO, if there bee two tenants in common of certaine land in fee, and they give this land to a man in taile, or let it to one for terme of life, rendring to them yearly a certaine rent, and a pound of pepper, and a hawke or a horse, and they bee seised of this service, and afterwards the whole rent is behind, and they distraine for this, and the tenant maketh rescouse. In this case as to the rent and pound of pepper they shall have two assises, and as to the hawke or the horse but one assise. And the reason why they shall have two assises as to the rent and pound of pepper is this, inso-much as they were tenants in common in severall titles, and when they made a gift in taile or lease for life, saving to them the reversion, and rendering to them a certaine rent, &c. such reservation is incident to their reversion; and for that their reversion is in common, and by severall titles, as their possession was before the rent and other things which may be severed, and were reserved unto them upon the gift, or upon the lease, which are incidents by the law to their reversion, such things so reserved were of the nature of the reversion. And in as much as the reversion is to them in common by severall titles, it behoveth

*Et de ceo ils averont deux assises, et chescun de eux en son assise ferra son plaint de le moitie de le rent, et de le moitie del liver de pepper. Mes de l'esperver ou de chival, que ne poyent estre severs, ils averont forsque un assise, car home ne poit faire un plaint, en assise de le moitie d'un esperver, ne de le moitie d'un chival, &c. En mesme le maner est d'auter rents et d'auter services que tenants en common ont en grosse per divers titles, &c.*

of a horse, &c. In the same manner it is of other rents and of other services which tenants in common have in grosse by divers titles, &c.

**"EN** cest case quant a le rent et liver de pepper, ils averont deux assises, et quant a l'esperver ou le chival forsque un assise."

But for the better understanding hereof it is to bee knowne, that  
[197. a.] if two tenants in common bee, and they grant a rent of 20 shillings *per annum* out of their land, the grantee shall have two rents of 20 shillings, for that every man's grant shall be taken most strongly against himselfe, and therefore they be several grants in law.

But if they two make a gift in taile, a lease for life, &c. reserving twenty shillings rent to them and their heires, they shall have but one 20 shillings, for they shall have no more then themselves reserved: and the donee or lesse shall pay but 20 shillings according to their own expresse reservation: and albeit the reservation of rents severable bee in joynt words, yet in respect of the several reversions the law make thereof a severance. Now for the rent, as namely 20 shillings or a pound of pepper may bee severed, the one tenant in common may have an assise for the moity of 20 shillings, and the moitie of a pound of pepper, *de medietate unius libr' piperis*, but he cannot have an assise of ten shillings, or *de dimidio libræ piperis*. But for the hawke or horse, albeit they be tenants in common, they shall joyne in an assise, for otherwise they should bee without remedie, for one of them cannot make his plaint in assise of the moitie of a hawke, or of a horse, for the law will never suffer any

[197. b.] man to demand any thing against the order of nature or reason, as before it appeareth by *Littleton*, Section 129.

*Lex enim spectat nature ordinem.* Also the law will never enforce a man to demand that which he cannot recover, and a man cannot recover [1] the moitie of a hawke, horse, or of any other entire thing: *Lex neminem cogit ad vana, seu inutilia.* But in that case they shall joyne in an assise, and the reason is, *Ne curia Domini Regis deficeret in justitiâ exhibendâ*, or, *Lex non debet deficere conquerentibus in justitiâ exhibendâ.* And if they should not joyne, they should have *damnum et injuriam*, and yet should have no remedie [\*] by law, which should be inconvenient, but the law will, that in every case where a man is wronged, and endammaged, that he shall have remedie. *Aliquid conceditur ne injuria remaneret impunita quod aliâ non concederetur.*

eth that the rent and the pound of pepper, which may be severed, be to them in common, and by severall titles. And of this they shall have two assises, and each of them in his assise shall make his plaint of the moitie of the rent, and of the moitie of the pound of pepper. But of the hawke or of the horse, which cannot be severed, they shall have but one assise, for a man cannot make a plaint in an assise of the moitie of a hawke, nor of the moitie

(Ante 147. b.)  
Pl. Com. Hill.  
& Granges case  
171. Vide Scot.  
219.  
(5 Rep. 7. b.)  
Flowd. 289. b.)

(5 Rep. 111.  
Ant. 145. b.)

Vide 16 Am. pl.  
1. 16 E. 3.  
Joynture on  
action. 27.

Regula.  
Vide Scot. 129.

[1] Lib. 5.  
fol. 21.  
Regula.  
(2 Cro. 169.  
Ant. 137. a.  
Hob. 43. 207.)  
[\*] 3 E. 3. 19.  
(1 Roll. Abr.  
107. Noy 184.  
Ant. 137.  
3 Rep. 66.)  
28 E. 3. 28.  
Regula.

[m] 1 H. 7. 2.  
13 E. 2. quare  
imp. 170.  
23 E. 6. 11.  
6 E. 4. 10.  
15 E. 3. darr.  
presentment 10.  
[n] 6 H. 4. 6. 7.  
45 E. 3. 10.  
20 E. 6. Ass. 20.  
10 E. 3. 10.  
(Moor 184.  
1 Roll. Rep. 343.)

[m] And tenants in common shall joyne in a *quare impedit*, because the presentation to the advowson is entire.

[n] Also tenants in common of a feignory shall joyne in a writ of right of ward, and ravishment of ward for the bodie, because it is entire.

If two tenants in common be of the wardship of the bodie, and one doth ravish the ward, and the one tenant in common releases to the ravisher, this shall goe in benefit of the other tenant in common, and he shall recover the whole, and this release shall not be any barre to him. And so it is if two tenants in common be of an advowson, and they bring a *quare impedit*, and the one doth release, yet the other shall sue forth, and recover the whole presentment.

Two tenants in common shall joyne in a detinue of charters, and if the one be nonsuit, the other shall recover.

It is said that tenants in common shall joyne in a *Warrantia Charta*, but sever in voucher.

"*Moltie de chival, &c.*" Here is implied or any other entire rent or service.

"*Per divers titles, &c.*" That is by severall titles, and not by one joynt title, as hath beene said.

Sect. 315.

**I**TEM, quant al actions personals tenants en common averont tiels actions personals joyntment en tous leur nosmes, \* sicome de trespas, ou † de offence que touche leur tenevements en common, sicome de bruser ‡ leur measons, || de enfreindre de leur closes, de pasture, degaster, et de fouler § des herbes, de couper leur bois, \*\* de pischer en leur pischarie, & hujusmodi. †† Et en cest cas tenants en common averont un action joyntment et recoveront jointment leur damages, pur ceo que l'action est en le personaltie, et nemy en le realtie, ‡‡ &c.

**A**LSO, as to actions personals tenants in common may have such action personals joyntly in all their names, as of trespasse, or of offences which concerne their tenevements in common, as for breaking their houses, breaking their closes, feeding, wasting, and defowling their grasse, cutting their woods, for fishing in their pischary, and such like. In this case tenants in common shall have one action joyntly, and shall recover joyntly their damages, because the action is in the personalty, and not in the realtie, &c.

20 E. 6. 51.  
45 E. 6. 24.  
46 E. 3. 37.  
4 H. 4. 3.  
24 E. 4. 31.  
6 H. 6. 27.

"*AVERONT tiels actions personals joyntment en tous leur nosmes &c.*" By this it appeareth that tenants in common shall have personall actions joyntly. And it is to be observed, that where damages are to be recovered for a wrong done to [198. a]

\* sicome—not added in Rob.  
† de not in Rob.  
‡ do added in Rob.  
§ do not in Rob.

§ des—de leur in Rob.  
\*\* et added in Rob.  
†† Et not in Rob.  
‡‡ &c. not in Rob.



to tenants in common, or parceners in a personall action, and one of them die, the survivor of them shall have the action; for albeit the property or estate be severall betweene them, yet (as it appeareth here by *Littleton*) the personal action is joynt.

(1. Sid. 187. Cro. Ja. 231. 1. Sid. 49. 2. Roll. Abr. 91. 10. Rep. 134. a.)

"*Et hujusmodi.*" Hereby is implied a diversity between a chattle in possession, and a personall *chose* in action belonging unto them. As if two tenants in common be of land, and one doth a trespasse therein, of this action they are joyntenants, and the survivor shall hold place. So it is if two tenants in common be of a manor, and they make a bailife thereof, and one of them dieth, the survivor shall have the action of account, for the action given unto them for the arrerages upon the account was joint. So it is if two tenants in common sow their land, and one doth eate the same with his cattle, though they have the corne in common, yet the action given to them for trespasse in the same is joynt, and shall survive. For the trespasse and damage done to them was joynt, all which here is implied by *Littleton*, who saith, that they shall have an action joyntly, and the same law is of coparceners.

But if two tenants in common be of goods, as of an horse or of any other goods personall, there if one dye, his executors shall be tenant in common with the survivor.

"*Et nemy en le realtie, &c.*" If two tenants in common be of an advowson, and a stranger usurpe, so as the right is turned to an action, and they bring a writ of *Quare impedit* which concernes the realtie, the sixe months passe, and the one dyeth, the writ shall not abate, but the survivor shall recover, otherwise there should be no remedie to redresse this wrong. And so it is of coparceners, and this is one exception out of our author's rule.

[a] But if three coparceners recover land and dammages in an assise of *Mordancester*, albeit the judgement be joynt, that they shall recover the land and dammages, yet the dammages being accessory, though they bee personall, doe in judgement of law depend upon the freehold being the principal, which is severall. And though the words of the judgement be joint, yet shall it be taken for distributive. And therefore if two of them dye, the entire dammages doe not survive, but the third shall have execution according to her portion; and this is another exception out of our author's rule. But if all three had sued execution by force of an *Elegit*, and two of them had dyed, the third should have had the whole by survivor, till the whole damages be paid.

If the aunt and niece join in an action of waste, for waste done in the life of the other sister, the aunt shall recover the dammages onely, because the same belongs not by law to the niece. And some hold the dammages in that case to be the principall.

12 H. 6. 22.  
23 H. 6. 14.  
18 E. 4. 30.  
3 E. 3. 10.  
10 H. 7. 27.  
21 H. 7. 22.  
37 H. 6. 32.  
21 E. 4. 12.

Wile Sect. 319,  
390, 391.

(2. Cro. 10.)  
23 H. 6. 12.  
36 E. 3. 7.  
13 E. 3. account 126.  
45 E. 3. 13, 14.  
37 H. 6. 32, 33.  
(1. Noy 135.  
2. Roll. Abr. 90.  
Moor 40. 71. 667.)

(Post. 200. a.)  
7. Rep. Halfs  
case sub 6a.  
10. Rep. 134.  
Ant. 144.)  
38 E. 3. 5.  
17 E. 2. 11.  
3 H. 5.  
Quare Imp. 71.  
14 H. 4. 12.  
9 H. 6. 30.  
23 H. 4. 14.  
37 H. 6. 9, b.  
10 Edw. Dyer 279.  
F. N. B. 35.  
9 E. 3. 36, 37.  
Pl. Com. Seignior  
Barkeley's case.  
(c) 14 E. 3.  
Execution 75.  
45 E. 3. 3. b.  
(5. Rep. 7.  
2. Roll. Abr. 88  
3. Rep. 14. b.  
Ant. 144. b.  
1. Roll. Abr. 362.

40 E. 3. 3. b.  
46 E. 3. 14.  
11 H. 4. 16. b.  
35 H. 6. 23. b.  
11 E. 2. Waste.  
115. 2. Cro. 19.  
Ant. 13. b.

(Cro. Jac. 331.  
1. Sid. 40.)

Sect. 316.

**I**TEM, si deux tenants en commun font un lease de leur tenements a un autre pur terme des ans, rendant a eux certaine rent annualment durant le terme, si le rent soit aderere, &c. les tenants en commun averont un action de debt envers le lessee, et nemy divers actions, pur ceo que l'action est en \* la personalty.

**A**LSO, if two tenants in common make a lease of their tenements to another for terme of yeares, rendring [198. b.] to them a certaine rent yearly during the terme, if the rent bee behind, &c. the tenants in common shall have an action of debt against the lessee, and not divers actions, for that the action is in the personalty.

This upon that which hath been said is evident.

Sect. † 317.

**M**ES en avowry pur le dit rent ils covient sever, car ceo est en le realtie, come le assise est supra.

**B**UT in an avowry for the said rent they ought to sever, for this is in the realty, as the assise is above.

Vid. 9. 3. 86, 87.  
Pl. Com. Selguier  
Barkley's case.

This being an addition to *Littleton*, albeit it be consonant to law yet I omit it.

(Stat. 32 H. 8.  
Ant. 167. a.  
157. a.)

Sect. 318.

**I**TEM, tenants en commun poyent bien faire partition enter eux s'ils voient, coment que ils † ne seront compelles de faire partition per la ley; mes s'ils font enter eux partition per leur agreement et consent, tiel partition est assets bone, come est adjudge en le liver d'assises ||.

**A**LSO, tenants in common may well make partition between them if they will, but they shall not be compelled to make partition by the law; but if they make partition betweene themselves by their agreement and consent, such partition is good enough, as is adjudged in the booke of assises.

\* Vid. Sect. 309.  
200. 247. 264.  
19. Ass. p. 1.  
20. Ass. p. 2.  
47 H. 3. 22.

Of this sufficient hath beene said in \* the Chapter of Parceners and Joyntenants.

"*En le liver d'assises.*" This booke is of great authoritie in law, and is so called because it principally containeth the proceedings upon writs of assise of *novel disseisin*, which in those dayes was *festinum et frequens remedium*.

\* Is not in L. and M. nor Roh

† No part of this Section in L. and M. nor Roh.

‡ No not in Roh. but in L. and M.

§ Cc. added in L. and M. and Roh.

## Sect. 319.

**I**TEM, si come y sont tenants en common de terres et tenements, &c. come est avantdit, en mesme le man-  
ner y sont § de chattels reals et perso-  
nals. Sicome \*\* lease soit fait de  
certaine terres a deux homes pur  
terme de 20 ans, et quant ils sont de  
[199. a.] ceo possesses l'un de les les-  
sees grant ceo que a luy af-  
fiert durant le terme a un auter,  
donque mesme celui a que le grant est  
fait et l'auter tiendront et occuper-  
ont en common.

**A**LSO, as there bee tenants in  
common of lands and tene-  
ments, &c. as aforesaid, in the same  
manner there be of chattels reals and  
personals. As if a lease bee made  
of certaine lands to two men for  
terme of 20 yeares, and when they  
be of this possessed, the one of the  
lessees grant that which to him be-  
longeth to another during the terme,  
then hee to whom the grant is made  
and the other shall hold and occupie  
in common.

**G**RANT ceo que a luy affiert." The same law it is if the  
one lessee in this case make a lease for part of the terme, the  
second lessee and the other are tenants in common, as hath been  
said in the Chapter of Joyntenants. The (Uc.) in this Section,  
implyeth other hereditaments whereof men may be tenants in com-  
mon, whereof sufficient hath beene said before.

Vid. Sect. 318.  
(Cro. Eliz. 33.  
Ant. 192. a.)

## Sect. 320.

**I**TEM, si deux \* ont † joyntment  
le garde de corps et de terre d'un  
enfant deins age, et l'un de eux grant a  
un auter ceo que a luy affiert de  
mesme le garde, donque le grantee, et  
l'auter que ne grant a pas, averont et  
tiendront ceo en common, &c.

**A**LSO, if two have joyntly the  
wardship of the body and land  
of an infant within age, and the one  
of them grant to another that which  
to himselfe belongeth of the same  
ward, then the grantee, and the  
other which did not grant, shall  
have and hold this in common, &c.

**H**EREBY it appeareth, that there may bee tenants in common  
as well of chattels reall entire, as wardship of the body, &c.  
as of chattels personal, as a hawke or a horse. If two tenants in  
common be of a seignory, and a ward fall, they are tenants in  
common of the wardship aswell of the body as land. And so it is  
if the land it selfe escheat to them, they shall be tenants in common  
thereof, and so it is of parceners.

16 E. 3. cit. Aid.

"En common, Uc." Here (Uc.) implyeth any other entire  
chattell.

Vid. devant,  
Sect. 318.

§ possessions et proprieters added in L. and  
M. and Roh.

\*\* si added in L. and M. and Roh.

[199. a.]

\* joyntenants added in L. and M. and  
Roh.

† joyntment not in L. and M. nor Roh.

## Sect. 321.

**E**N mesme le maner est de chateux personals. Sicome deux ont † joynment per done ou per achate un chival ou boefe, &c. et l'un grant ceo que a luy affiert || de mesme le chival ou boefe a un auter, donques le grantee, et l'auter que ne granta pas, averont et possideront tiels chateux personals en common. Et en tiels cases, ou divers persons ont chateux reals ou personnels en common ¶ et per divers titles, si l'un de eux morust, les autres que survesquont n'arera ceo per le survivoor, mes les executors celuy que morust tiendront et occupieront ceo ovesque eux que survesquont, sicome lour testator fist ou devoil en sa vie, &c. pur ceo que lour tiels et droits en ceo fueront severals, &c.

**I**N the same manner it is of chattels personals. As if two have joyntly by gift or by buying a horse or an ox, &c. and the one grant that to him belongs of the same horse or ox to another, the grantee, and the other which did not grant, shall have and possesse such chattels personals in common. And in such cases, where divers persons have chattels real or personall in common, and by divers titles, if the one of them dieth, the others which survive shal not have this as survivor, but the executors of him [199. b.] which dieth shall hold and occupie this with them which survive, as their testator did or ought to have done in his life time, &c. because that their titles and rights in this were severall, &c.

Vid. devent,  
Sect. 314.

This is evident enough, and hereof sufficient hath beene said before.

## Sect. 322.

**I**TEM, en le case avantdit, sicome deux ont estate en common pur terme d'ans, &c. l'un occupie tout, et mist l'auter hors de possession et occupation, &c. donques celuy que est mise hors de occupation avera envers l'auter brieve de ejectione firmæ de la moitie, &c.

**A**L80, in the case aforesayd, as if two have an estate in common for terme of years, &c. the one occupy all, and put the other out of possession and occupation, hee which is put out of occupation shall have against the other a writ of *ejectione firmæ* of the moitie, &c.

## Sect. 323.

**E**N mesme le maner est lou deux teignent le gard des terres ou tenements durant le nonage d'un enfant, si l'un

**I**N the same manner it is where two hold the wardship of lands or tenements during the nonage of an enfant,

† joynment—joynst estate, in L. and M. and Roh.

|| de mesme le chival ou boefe not in L.

and M. nor Roh.

§ &c. added in L. and M. and Roh.

¶ &c. added in L. and M. and Roh.

*l'un ousta l'auter de son possession, il que est ouste avera briefe de ejectment de gard de le moitie, &c. pur ceo que ceux choses son chateaux realx, et poyent estre appportions et severs, &c. Mes nul \* action de trespas, e'estascavoir, Quare clausum suum fregit, et herbam suam, &c. conculcavit, et consumpsit, &c. et hujusmodi actiones, &c. l'un ne poet aver envers l'auter, pur ceo que chescun de eux poet entrer et occuper en common, &c. per my et per tout, les terres et tenements § queux ils teignent en common. Mes si deux sont possesses de chattels personalx en common per divers titles, sicome d'un cheval, ou boef, ou vache, &c. si l'un prent ceo tout a luy hors de possession d'auter, l'auter n'ad nul auter remede mes de prendre ceo de luy que ad fait luy le tort pur occuper en common, &c. quant † il poet veier son temps, &c. En mesme le manuer est de chattels realx que ne poyent estre severs, sicome en le case avantdit, que deux sont possesse d'un gard de corps d'un enfant deins age, si l'un prent l'enfant hors de possession d'auter, l'auter n'ad aucun remede per aucun action per la ley, mes de prendre l'enfant hors de le possession d'auter quaut il veit son temps †.*

fant, if the one oust the other of his possession, he which is ousted shal have a writ of *ejectment de gard* of the moitie, &c. because that these things are chattels real, and may be apportioned and severed, &c. but no action of trespass (*videlicet*) *Quare clausum suum fregit, et herbam suam, &c. conculcavit, et consumpsit, &c. et hujusmodi actiones, &c.* the one cannot have against the other, for that each of them may enter and occupie in common, &c. *per my et per tout*, the lands and tenements which they hold in common. But if two be possessed of chattels personalls in common by divers titles, as of a horse, an ox, or a cowe, &c. if the one take the whole to himselfe out of the possession of the other, the other hath no other remede but to take this from him who hath done to him the wrong to occupie in common, &c. when he can see his time, &c. In the same manner it is of chattels real, which cannot be severed, as in the case aforesaid, where two be possessed of the wardship of the bodie of an infant within age, if the one taketh the infant out of the possession of the other, the other hath no remede by an action by the law, but to take the infant out of the possession of the other when he sees his time,

“**PUR** terme de ans, &c.” For one yeare, halfe a yeare, &c.

(Sld. 49.)

“*L'un occupie tout et mist l'auter hors de possession.*” These are words materially added, for albeit one tenant in common take the whole profits, the other hath no remede by law against him, for the taking of the whole profits is no ejectment: (1) But if he drive out of the land any of the cattell of the other tenant in common, or not suffer him to enter or occupy the land, this is an ejectment or expulsion, whereupon he may have *ejectione firme*, for the one moitie, and recover damages for the entrie, but not for the meane profits.

(Hob. 120.  
Plo. 247. Sld. 33.  
Mo. 123. 375.)

(1. Roll. Abr. 741.  
Noy. 14.)  
(Cro. Jac. 611.)

“*Ejectione firme de la moity, &c.*” Here by this and the other (&c.) in these two Sections, are to be understood divers diversities between

(2. Rep. 68.  
F. F. B. 197.)

\* *niel* added in L. and M. and Roh.  
§ *Uc.* added in L. and M. and Roh.  
‡ not in L. and M. nor Roh.

‡ *Uc.* added in L. and M. but not in Roh.  
(1) [See Note 83.]

between actions which concerne right and interest, (as of *ejectione firmae*, *rejection le gard*, *quare ejecit infra terminum* of a chattell real upon an expulsion or ejectment) and actions concerning the bare taking of the profits rising off the land or doing of trespassse upon the land, as here by the examples doe appeare, for the right is severall, and the taking of the profits in common. The second diversity is between chattells realls that are apportionable or severable, as leases for yeares, wardship of lands, in- [200. a.] terest of tenements by *elegit*, statute merchant, staple, &c. of lands and tenements, and chattells realls entire, as wardship of the body, a villeine for yeares, &c. for if one tenant in common take away the ward, or the villeine, &c. the other hath no remedie by action, but he may take them againe. Another diversitie is betweene chattells realls and chattells personalls, for if one tenant in common take all the chattells personalls, the other hath no remedie by action, but he may take them againe; and herein the like law is concerning chattells realls entire, and chattells personall for this purpose. But of chattells entire, as of a sheep, horse, or any other entire chattell, reall or personall, no survivor shall be betweene them that hold them in common: and tenants in common shall not joyne in an *ejectione firmae*, nor in a writ of *ejectment de gard*, or a *quare ejecit infra terminum*, &c. for that these actions concerne the right of lands which are severall.

If two tenants in common be of a mannor, to the which waife and stray doth belong, a stray doth happen, they are tenants in common of the same, and if the one doth take the stray, the other hath no remedie by action, but to take him againe. But if by prescription the one is to have the first beast happening as a stray, and the other the second, there an action lieth if the one take that which pertaines to the other.

If two tenants in common be of a dove-house, and the one destroy the old doves, whereby the flight is wholly lost, the other tenant in common shall have an action of trespassse, *quare vi et armis columbare le pul' fregit et ducentas columbas pretij 40s. interfecit, per quod volatum columbaris sui totaliter amisit*: for the whole flight is destroyed, and therefore hee cannot in barre plead tenancie in common. And so it is if two tenants in common bee of [200. b.] a parke, and one destroyeth all the deere, an action of trespassse lieth.

[c] If two tenants in common be of land, and of mete stones, *pro metis et bundis*, and the one take them up and carrie them away, the other shall have an action of trespassse *quare vi et armis* against him, in like manner as he shall have for the destruction of doves.

[d] If two tenants in common be of a folding, and the one of them disturbe the other to erect hurdles, he shall have an action of trespassse *quare vi et armis* for this disturbance.

[e] If two severall owners of houses have a river in common betweene them, if one of them corrupt the river, the other shall have an action upon his case.

[f] If two tenants in common, or jointenants, be of an house or mill, and it fall in decay, and the one is willing to repaire the same, and the other will not, he that is willing shall have a writ *de reparatione faciendâ*; and the writ saith, *ad reparationem et sustentationem ejusdem domus teneantur*; whereby it appeareth, that owners

are

21 E. 4. 11. m.  
43 E. 1. 34.  
46 E. 3. 13.  
23 H. 4. 50. 58.  
9 H. 6. 17.  
19 H. 6. 57.  
23 H. 6. 10.  
2 E. 4. 53.  
14 E. 4. 8.  
18 E. 4. 30.  
37 H. 6. 3.  
31 K. 3. 29.  
13 Am. 23.  
47 E. 3. 23. b.  
30 H. 7. 16.  
F. N. B. 117. a.  
17 E. 2. Ac-  
count 122.  
(Ant. 198. a.)  
10 H. 4.  
Trespas. 178.  
11 H. 4. 3.  
(Sir Tho. Ray.  
15. 1. Lev. 29.)  
21 E. 4. 11. 12.  
(Ant. Ber. 311.  
& fol. 197. b.)

13 F. 3.  
Bri. 6. 674.  
(2. Roll. Abr. 866.)

47 E. 3. 23. b.

4 F. 2. Trespas  
233.

[c] 1 H. 5. 1.  
2 H. 5. 3.

[d] 13 E. 3.  
Trespas 212.  
19 H. 3. Br.  
927. 11 E. 3.  
Trespas 212.  
Vb. 18 H. 6. 5.  
[e] 13 H. 7. 26.

[f] F. N. B. 127.  
Reg. 163.  
(Ant. 54. b.)

are in that case bound *pro bono publico* to mainetaine houses and mills which are for habitation and use of men.

If one jointenant or tenant in common of land maketh his companion his baylife of his part, he shall have an action of account against him, as hath bin said. But although one tenant in common or jointenant without being made baylife take the whole profits, no action of account lieth against him; for in an action of account he must charge him either as a guardian, baylife, or receiver, as hath beene said before, which he cannot do in this case, unlesse his companion constitute him his bailife. And therefore all those bookes which affirm that an action of account lieth by one tenant in common, or jointenant, against another, must be intended when the one maketh the other his bailife, for otherwise never his baylife to render an account is a good plea.

If there be two tenants in common of a wood, turbarie, piscarie, or the like, and one of them doth wast against the will of his companion, his companion shall have an action of wast, and he that did the wast before judgement, hath election either to take his part in certaintie by the sherife and the oath of men, &c. or that he grant, that from thenceforth he shal not do wast but according to his portion, &c. and if he make choice of a certain place, then the place wasted shall be assigned to him. [g] But this extends not to coparceners, because they were compellable to make partition by the common law: and this, as it is said, doth extend as well to tenants in common and joyntenants, for life, as to an estate of inheritance. But if one tenant in common, or joyntenant of a dovehouse destroy the whole flight of doves, no action of wast doth lie in that case upon the said statute, \* as some doe hold.

If lands be given to two, and to the heires of one of them, and the tenant for life doth wast, he that hath the inheritance shall have no action of wast by the statute of *Gloucester*, but upon the statute of *W. 2.* he shall have an action of wast. And it is to be knowne, that one tenant in common may infeoffe his companion, but not release, because the freehold is severall. Joyntenants may release, but not infeoffe, because the freehold is joynt; but coparceners may both infeoffe and release, because their seisia to some intents is joynt, and to some severall (1).

17 E. 3. tit.  
Account 22.  
8 E. 2.  
Account 115.  
30 E. 1.  
Account 137.  
45 E. 3. 10.  
47 E. 3. 22. b.  
38 E. 3. 9.  
28 E. 3. 60.  
3 E. 3. 27.  
39 E. 37. 82.  
F. N. B. 118. i.  
10 H. 7. 16.  
2 E. 4. 25.  
(Ant. 173. a.)  
F. N. B. 118.  
1 Roll. Abr. 118.  
2 Inst. 379.  
W. 3. ca. 23.

[g] 27 H. 8. 13.  
21 E. 3. 20.  
29 E. 3. 30.  
3 E. 3. Wast. 35.  
F. N. B. 89. d.  
F. N. B. 49. i.

\* 47 E. 3. 22.  
50 E. 3. 3.  
10 E. 4. 3. b.  
22 H. 6. 42.  
21 E. 3. 47.  
17 E. 3. 47.  
18 E. 4. 27.  
28 E. 3. 4.  
(2 Inst. 403.)  
11 Rep. 49.  
Ant. 83. b.  
F. N. B. 59. d.  
2 Roll. Abr. 86.  
403.  
Ant. 186. b.  
Post. 335. a.)

## Sect. 324.

**I**TEM, quant un home \* voile monstrer un feoffement fait a luy, ou un done en le tail, ou un lease pur terme de vie d'ascun terres ou tenements, la il dirra, per force de quel feoffement, done, ou leas, il fuit seisie, &c. mes lou un voile pleade un leas ou grant

**A**LSO, when a man will shew a feoffement made to him, or a gift in taile, or a lease for life of any lands or tenements, ther he shal say, by force of which feoffement, gift, or lease, he was seised, &c. but where one will plead a lease or grant made

(1) [See Note 83†.]

\* en pledaunt added in L. and M. and Roh.

*grant fait a luy de chattel real ou personnel, la il dirra, per force de quel il fuit possesse, &c.*

*Pluisserra dit detenants en common en le Chapter de Releases † et Tenant per Elegit.*

made to him of a chattel real or personal, then he shal say, by force of which he was possessed, &c.

More shall be said of tenants in common in the Chapters of Releases and Tenant by Elegit.

**"*L fuit seiscie, &c.*"** *Seisin* is a word of art, and in pleading is only applied to a freehold at least, as *possesse* for distinction sake is to a chattel real or personal. As if *B.* plead a feoffment in fee, he concludeth, *virtute cuius prædicti.* *B. fuit seiscitus, &c.* But if he plead a lease for yeares, he pleadeth, *virtute cuius prædictus B. intravit, et fuit inde possessionatus;* and so of chattells personalls, *virtute cuius fuit inde possessionatus.*

And this holdeth not only in case of lands or tenements which lie in liverie, but also of rents, advowsons, commons, &c. and other things that lie in grant, whereof a man hath an estate for life or inheritance.

Also when a man pleads a lease for life, or any higher estate which passeth by liverie, he is not to plead any entrie, for he is in actuall seisin by the liverie it selfe. Otherwise it is of a lease for yeares, because there he is not actually possessed untill an entrie.

† *et confirmacions* added in L. and M. and Rob.

(Plowd. Com.  
263. a.  
Fent. 303. a.  
Plow. 140. b.  
Fent. 310. b.  
Noy. 26.)

END OF THE FIRST VOLUME.





